Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PRO-FOOTBALL, INC. d/b/a
THE WASHINGTON REDSKINS,

Petitioner,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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88 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals, which ordered summary judgment for the Respondent-insurer on the issue of whether it could retroactively charge workers' compensation insurance premiums at District of Columbia premium rates (rather than the agreed-upon Virginia rates, which are lower), erroneously failed to place the appropriate burden under Fed. R. Civ. P. 56 on the insurer to show that its construction of the insurance policy at issue was the only reasonable construction of that policy.

2. Whether the dismissal of Petitioner's compulsory counterclaims as time-barred is inconsistent with the policies underlying the Federal Rules of Civil Procedure, where the counterclaims were filed within the time limits specified in Fed. R. Civ. P. 12.

LIST OF ALL PARTIES BELOW

The parties to this proceeding in the court below were Pro-Football, Inc. d/b/a The Washington Redskins and The Hartford Accident and Indemnity Company.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Pursuant to S. Ct. R. 29.6, Pro-Football, Inc. states that it has no subsidiaries and that its sole parent is Jack Kent Cooke Incorporated.

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OPINIONS BELOW

The Court of Appeals' opinion is reported at 127 F.3d 1111 (D.C. Cir. 1997), and is reproduced at Appendix ("App.") 1-23. The District Court's opinion, App. 25-43, is unreported. The Court of Appeals' denials of Petitioner's petition for rehearing and suggestion for rehearing *en banc,* App. 44, 45, are unreported.

JURISDICTION

The Court of Appeals issued its opinion on October 28, 1997, and denied Petitioner's petition for rehearing and suggestion for rehearing *en banc* on December 10, 1997. This Petition is being filed within 90 days of the denial of the petition for rehearing, as required by S. Ct. R. 13.1 and 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This Petition is not a cross-petition, and Petitioner does not rely on S. Ct. R. 12.5.

STATUTORY PROVISIONS INVOLVED

This Petition involves Fed. R. Civ. P. 12(a)(1)(A), 12(a)(4)(A), 13(a), 56(a), and 56(c), which are set forth at App. 46-48.

STATEMENT OF THE CASE

I. THE INSURANCE POLICY

Respondent The Hartford Accident and Indemnity Company ("Hartford") provided three one-year workers' compensation insurance policies between July 1988 and July 1991 (collectively the "Policy") to Petitioner Pro-Football, Inc. ("PFI"), a corporation headquartered in Virginia that owns and operates the Washington Redskins. App. 25-26. Like all insurance contracts, the Policy shifted the risk of loss to the insurer in return for a premium. Under the Policy, Hartford agreed to pay workers'

compensation benefits for injured employees of PFI, including Redskin players. As Hartford well knew, because the Redskins play football games in the District of Columbia, players could incur injuries there and assert claims for District of Columbia workers' compensation benefits. *See* App. 2 ("[The District of Columbia] allow[s] recovery [of benefits] by an employee who is injured within [its] borders.").

Hartford nonetheless agreed to charge Virginia premium rates, which were substantially lower than District of Columbia rates, to cover Redskin players. App. 27.[1] This agreement reflected the fact that Redskin players spent the vast majority of their working hours in Virginia. App. 26.[2] The agreement was highly significant, because (as Hartford knew) benefits are higher in the District of Columbia than in Virginia. App. 28.

Workers' compensation insurance premiums vary depending on the types of work performed by the policyholder's employees (which are referred to as "classifications"). App. 27. Not surprisingly, premiums are higher for job classifications involving a greater risk of injury. *See id.* n.4. The Policy grouped PFI's employees

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[1]As the parties stipulated in the District Court, premium rates are set by state insurance regulators and vary from state to state. Joint Stipulations of Fact ("J.S.") ¶¶ 50-51.

[2]During the regular season Redskin players practiced and trained five days a week at Redskin Park in Herndon, Virginia. J.S. ¶ 3. They predominantly signed their employment contracts in either Carlisle, Pennsylvania (where the Redskins held a pre-season training camp) or Virginia, and they received paychecks issued in Virginia. Affidavit of Stuart A. Haney in support of Pro-Football's Motion for Summary Judgment ("Haney Aff.") ¶ 4. By contrast, Redskin players worked in the District of Columbia on only eight Sunday afternoons during the regular football season and on no more than four other dates for pre-season and post-season games. J.S. ¶¶ 2, 4; Haney Aff. ¶ 5.

into three classifications: (1) contact sports (*i.e.*, football players); (2) operations and drivers; and (3) clerical employees. App. 27. The Policy's "Classifications Clause" stated, "These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy." App. 20.

PFI's premiums also depended on the size of its payroll; the larger the payroll, the larger the premium. Under the Policy, the "[p]remium for each work classification is determined by multiplying a rate times a premium basis [*i.e.*, the payroll and all other remuneration (App. 34)]." App. 20.

Premiums could be adjusted retroactively under certain limited circumstances, which were spelled out in the Policy's "Final Premium Clause":

> The Premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance.

App. 20-21. The "Audit Clause" of the Policy gave Hartford the right to audit PFI's books and records to develop information for determining the final premium. App. 21. The Policy's terms, however, could "not be changed . . . except by endorsement." App. 20. Thus, if

the "actual . . . premium basis" differed from the "estimated" premium basis and/or the parties had failed to assign "proper classification[s] and rates," the premium could be adjusted retroactively by endorsement.

Premiums could also be changed *prospectively* if the policyholder experienced higher-than-expected losses. App. 28. In such cases, the premium would be multiplied by an "experience modification factor" (also known as a "mod" or "mod factor"). App. 5. Hartford utilized the mod to increase PFI's premiums during the three years the Policy was in effect, App. 28, and (as Hartford recognized in its opening brief in the Court of Appeals) by 1991 the mod was "quite high," Brief for The Hartford Accident and Indemnity Company ("Hartford Br.") at 12.

PFI has paid Hartford approximately $1.7 million in premiums under the Policy. Hartford, however, has paid out only approximately $1.4 million in benefits. J.S. ¶¶ 77, 78.[3]

II. THE *ANDERSON* DECISION

Before Hartford ever insured PFI, injured Redskin players had filed for workers' compensation benefits in the District of Columbia, seeking the higher benefits paid by the District. App. 28. This fact was well-known to Hartford prior to its issuance of the Policy and its agreement to charge Virginia premium rates. Like PFI's prior workers' compensation insurer, Hartford defended PFI against claims for District of Columbia benefits. *Id.*[4]

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[3]Hartford has reserved approximately $600,000 for potential payments of benefits that may arise from the three policy years. J.S. ¶ 79. This reserve is known as the "tail."

[4]PFI, having shifted the risk of loss to Hartford, relied on Hartford to defend these claims; PFI was the nominal party and was passive in the litigation.

Moreover, Hartford typically settled such claims with the approval of the District of Columbia Department of Employment Services ("DOES"). Affidavit of Stuart A. Haney in support of Pro-Football's Motion for Summary Judgment ("Haney Aff.") ¶ 16.

In 1989, however, in a case known as *Anderson*, the Director of DOES held certain Redskin players eligible for District of Columbia workers' compensation *benefits*, even though they had not been injured there. *Id.* If, as Hartford *now* claims, it truly believed this ruling obligated it to charge District of Columbia *premiums* for coverage of Redskin players, Hartford could have informed PFI on July 10, 1989, the date of the Director's decision, of its intention to charge District of Columbia premium rates for the upcoming policy year beginning on July 14, 1989, and all subsequent policy years unless and until the decision was reversed. Alternatively, Hartford could have informed PFI that it would continue to charge Virginia premiums pending appeal to the District of Columbia Court of Appeals, but that if the court affirmed, then Hartford would have to increase PFI's premiums retroactively to District of Columbia rates. Hartford took neither of these actions. Instead, in an apparent effort to keep PFI's business for the 1989-90 and 1990-91 policy years, Hartford "continued to agree to classify Redskins players and coaches as Virginia employees," App. 35 n.8, renewing the Policy in July 1989 and again in July 1990 at Virginia premium rates. *See* J.S. ¶ 71. Hartford never suggested (prior to April 1991) that the premiums were contingent upon the outcome of *Anderson*, nor did it ever intimate that it would rely upon an adverse decision in *Anderson* to assess District of Columbia premiums retroactively. J.S. ¶ 68.

On PFI's behalf, Hartford appealed *Anderson* to the District of Columbia Court of Appeals. In March 1991, however, that court upheld the Director's finding because it was not "plainly wrong." *Pro-Football, Inc. v. District of Columbia Dep't of Employment Servs.*, 588 A.2d 275, 279 (D.C. 1991). In so holding, the court recognized it had to apply a highly deferential standard of review, "even if another construction may be just as reasonable as the agency's, and even if we might have reached a different conclusion had the initial decision been ours to make." *Id.*[5] Neither the Director of DOES nor the *Anderson* court said anything, however, about whether the players were District of Columbia employees for purposes of determining *premiums*, because the issue of premiums was never litigated in *Anderson*.[6] As Hartford concedes, "no issue was or could have been presented in [*Anderson*] relating to the premium calculation for the Redskins workers' compensation insurance policies." Hartford Br. at 16.

III. THE RETROACTIVE PREMIUM INCREASE AND THE TOLLING AGREEMENT

Nonetheless, on April 17, 1991, after the 1990-91 football season had ended and the primary exposure of football players to injury had ceased, Hartford notified PFI

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[5]Indeed, another court held Redskin players to be Virginia employees. *National Football League Players Ass'n v. Pro-Football, Inc.*, 857 F. Supp. 71, 79, 80 (D.D.C. 1994), *appeal dismissed as moot*, 79 F.3d 1215 (D.C. Cir. 1996).

[6]Had *Anderson* been a premiums dispute, football players would not have been parties. The players' interest was in the benefits, not the premiums. A dispute regarding premiums -- if there were to be one -- would have been between Hartford and PFI. *Anderson* was not such a case.

that the *Anderson* decision *obligated* Hartford to charge District of Columbia premiums retroactively. J.S. ¶ 73. In other words, after losing the *Anderson* case on PFI's behalf, Hartford sought to profit from the loss at the expense of its insured.

Applying District of Columbia premium rates, Hartford billed PFI almost $8 million in additional premiums. J.S. ¶¶ 75, 77. PFI refused to pay, and, following negotiations, Hartford agreed its computation was erroneous and lowered its demand to approximately $5.3 million, which was still more than three times the $1.7 million PFI had already paid in premiums and almost four times the $1.4 million players had received in benefits. *Id.* ¶¶ 77-78. PFI refused to pay the revised demand and the parties continued to negotiate. To facilitate the negotiations, the parties entered into an agreement that protected both of them by extending the statute of limitations until October 22, 1994, for "an[y] action in connection with the unpaid premiums." App. 39.

IV. THE COMPLAINT

Even though PFI continued to negotiate in good faith, Hartford brought a diversity action on Thursday, October 20, 1994 -- two days before the statute of limitations expired. Thus, unless the filing of the complaint tolled the statute of limitations, PFI had less than two days to receive service of the complaint, retain counsel, answer, and counterclaim. In its complaint, Hartford admitted it had "acquiesced in PFI's request to initially classify all non-clerical personnel as Virginia employees," but also alleged that *Anderson* "obligated" it to charge premiums at District of Columbia rates. Complaint ¶¶ 15, 16. Claiming PFI had breached the Policy by refusing to pay the additional premiums,

Hartford pleaded three counts of breach of contract, one for each policy year, and sought $5.3 million in additional premiums as damages.

V. THE COUNTERCLAIMS

PFI timely moved to dismiss. The District Court denied the motion and, within the time limits specified in the Federal Rules of Civil Procedure, PFI answered and counterclaimed for breach of contract, fraud, negligent misrepresentation, breach of fiduciary duty, and bad faith. PFI alleged, ***inter alia***, that Hartford had a conflict of interest. On the one hand, Hartford represented PFI in ***Anderson*** and had a duty to defend PFI's interests in that litigation. At the same time, however, Hartford failed to disclose that, if it lost ***Anderson***, it would use that loss against PFI by retroactively charging District of Columbia premiums; indeed, Hartford had an economic incentive to lose ***Anderson***, because it stood to make more money if District of Columbia premium rates applied, since its compensation was linked to the rates charged.

VI. THE DISTRICT COURT'S RULING

Hartford moved to dismiss the counterclaims, and both parties moved for summary judgment on Hartford's complaint. The District Court granted Hartford's motion to dismiss the counterclaims, denied Hartford's motion for partial summary judgment, and granted PFI's motion for summary judgment. App. 25.

A. The Grant Of Summary Judgment

Addressing first the cross-motions for summary judgment, the District Court observed that Hartford had "agreed at the outset that classification of the players as Virginia employees was appropriate." App. 37. The District Court held that Hartford could not "effect a

change in the policy's terms and charge additional premiums for the 1988 and 1989 policy years" because the Policy "unequivocally states" that its terms "can only be changed through endorsement" and Hartford "unquestionably ~~only~~ issued an endorsement . . . for the 1990-91 policy." App. 33.

The court went on to hold that, even if Hartford had issued an endorsement, summary judgment for PFI would still be appropriate because "the policy does not authorize Hartford to change the jurisdictional basis of the policy" retroactively. App. 34. The court reasoned that

> changes to the "business or work" classifications may be made through endorsement to the policy if the classifications in the policy do not properly describe an employer's "actual exposures." For example, if employees classified as office personnel in fact performed construction work, Hartford could reclassify those employees and assess the corresponding rates and premium basis by endorsement to the policy. It is evident, however, that the Classifications clause goes to the work classifications of the insured's employees, and not the jurisdictional basis of the rates assigned to those classifications. Had the parties intended the clause to include *geographic* classifications as well as "business or work" classifications, presumably they would have included such language in an endorsement to the policy.

Id. (footnote omitted).

The court further reasoned that "final premium equals final classifications and rates, as determined under

the Classification clause (which require an endorsement to change) multiplied by the actual premium basis [*i.e.*, the Redskins' actual payroll and all other remuneration], as determined under the Audit clause." App. 35. The District Court rejected Hartford's argument that the Final Premium Clause authorized it to apply District of Columbia rates. *Id.* As the District Court noted, "such an interpretation conflicts with the express policy provisions setting forth the basis for calculating final premiums . . . as well as the general provision requiring changes in the terms of the policy to be made through an endorsement." *Id.*

The court likewise rejected Hartford's argument that *Anderson* required Hartford to charge District of Columbia premium rates, stating, "Hartford's position would require interpreting the policy to authorize that which its plain language does not." App. 33. As the court held, nothing in *Anderson*

> mandated Hartford to retroactively switch the jurisdictional basis of its policies. *Anderson* held that Redskins players who play at RFK Memorial Stadium may collect D.C. workers compensation benefits if they are injured in the course of employment. . . . But the decision cannot be read as mandating a retroactive change in the jurisdiction of the premiums, particularly in light of the absence of an express provision in the contract addressing such a potential change.

App. 35-36.

B. The Dismissal Of The Counterclaims

The District Court granted Hartford's motion to dismiss PFI's counterclaims, deeming them barred by the District of Columbia's three-year statute of limitations on

tort and contract claims. App. 38. In the court's view, PFI's counterclaims accrued no later than the spring of 1991, after Hartford "notified [PFI] that it was . . . demanding millions of dollars in additional premiums." App. 38-39. The District Court acknowledged the tolling agreement, but observed that PFI filed its counterclaims on October 10, 1995, which was after the agreement's October 22, 1994 deadline. *Id.*

The court rejected PFI's argument that Hartford's filing of a complaint within the time limit set forth in the tolling agreement tolled the statute of limitations for compulsory counterclaims. App. 39-40. The court conceded that "tolling may be the majority approach," but held that the District of Columbia had rejected this approach in *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826, 830 (D.C. 1972). The court rejected PFI's reliance on *De Vito v. Hoffman*, 199 F.2d 468 (D.C. Cir. 1952), which follows the majority rule, on the grounds that *De Vito* "predates *Goudie* by 20 years and is not controlling here." App. 39 n.12. Consequently, the court concluded, the counterclaims were time-barred, App. 40; they had not been filed in the two-day period between Hartford's complaint and the expiration of the tolling agreement.

VII. THE COURT OF APPEALS' RULING

Hartford appealed and PFI cross-appealed. The Court of Appeals consolidated the appeals, affirmed the dismissal of the counterclaims, reversed the grant of summary judgment for PFI, and remanded with instructions to enter summary judgment for Hartford. App. 16, 18.

The Court of Appeals concluded that the Policy unambiguously permitted a retroactive premium increase, App. 8-9, even though Hartford admitted that "no issue

. . . relating to the premium calculation" for the Policy "was or could have been presented" in *Anderson*, Hartford Br. at 16, and even though the District Court, ***which also found the Policy unambiguous***, reached exactly the opposite result, App. 33. The Court of Appeals also held that Hartford was not required to issue an endorsement to effect such a retroactive premium increase despite the fact that the Policy expressly required an endorsement to change the Policy's terms. App. 13-16. If Hartford had issued such an endorsement, PFI could have declined to renew the Policy and, instead, self-insured at a lower cost.

The Court of Appeals affirmed the dismissal of PFI's compulsory counterclaims as time-barred, holding that the District of Columbia no longer follows the majority rule on tolling. App. 17-18. The Court of Appeals did so even though it conceded that there is "considerable law (and sensible policy) on PFI's side." App. 17.

REASONS FOR GRANTING THE WRIT

This case presents important issues of civil procedure and insurance law. By purchasing workers' compensation insurance from Hartford, PFI shifted to Hartford the risk of loss for workers' compensation claims. In return, PFI paid a premium that the parties agreed would be calculated at Virginia premium rates. The bargain was an excellent one for Hartford. To date, PFI has paid $1.7 million in premiums and Hartford has paid out only $1.4 million in benefits. Yet now, long after the policy period has ended, Hartford seeks to rewrite the contract to allow it retroactively to charge District of Columbia premium rates, which are substantially higher than Virginia rates, to obtain $5.3 million in additional premiums.

The Court of Appeals ordered the District Court to grant summary judgment for Hartford, concluding that

the Policy unambiguously permitted a retroactive premium increase in light of *Anderson*. In reaching this result, the Court of Appeals adopted constructions of the Policy that it deemed "plausible," even though it conceded that, in order to justify summary judgment, its reading of the Policy had to be "the only reasonable construction of [the Policy's] terms." App. 14 & n.3. By applying the more easily satisfied "plausibility" standard, the court improperly relieved Hartford of its burden, as the party seeking summary judgment, of showing that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. Only by relieving Hartford of this burden could the Court of Appeals order summary judgment for Hartford. Indeed, the Court of Appeals reached this result even though Hartford admitted that "no issue . . . relating to the premium calculation" for the Policy "was or could have been presented" in the case on which the Court of Appeals relied to justify its decision, Hartford Br. at 16, and even though the District Court, which also found the Policy unambiguous, reached exactly the opposite result. In so holding, the Court of Appeals ignored the requirements of Fed. R. Civ. P. 56 and the parties' agreement to charge Virginia premium rates, and effectively enabled Hartford to shift the risk of loss back to PFI, contrary to core principles of insurance law.

The Court of Appeals further erred (both as a matter of civil procedure and as a matter of insurance law) in holding that Hartford was not required to issue an endorsement to effect such a retroactive premium increase. The Policy expressly required an endorsement to change the Policy's terms, and Hartford's failure to issue one worked a significant hardship on PFI because, if Hartford had issued such an endorsement, PFI could have declined to renew the Policy and, instead, self-insured.

Finally, the Court of Appeals erred in affirming the dismissal of PFI's compulsory counterclaims as time-barred. When Hartford filed its complaint just before the statute of limitations expired, PFI moved to dismiss, as permitted by Fed. R. Civ. P. 12. When PFI's motion was denied, PFI answered and counterclaimed within the time limits specified in Fed. R. Civ. P. 12(a)(4)(A). The Court of Appeals conceded that there is "considerable law (and sensible policy) on PFI's side," App. 17, but still affirmed the dismissal of the counterclaims, holding that the filing of Hartford's complaint did not toll the statute of limitations. This result is contrary to the policies underlying the Federal Rules of Civil Procedure. Unless compulsory counterclaims relate back to the filing of the complaint, a plaintiff can wait until just before the statute of limitations runs to file the complaint and thus deprive the defendant of the right to file a counterclaim.

The Court of Appeals' decision conflicts with decisions of this Court and other courts of appeals, and "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a). Further, because the policy at issue is "a type common for workers' compensation," App. 2, the Court of Appeals' decision has ramifications far beyond the present case. For all of these reasons, this Court should grant the Petition.

I. THE COURT OF APPEALS ERRED IN ORDERING SUMMARY JUDGMENT FOR HARTFORD

A. The Court Of Appeals Erred In Holding, On Summary Judgment, That The Policy Unambiguously Permitted A Retroactive Premium Increase Based On *Anderson*

This case concerns fundamental principles of federal civil procedure and insurance law. "The payment of the premium by the insured and the assumption of a specified risk by the insurer are the essential elements of the contract of insurance." 5 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 69:2, at 69-7 to 69-8 (1996) ("*Couch*"). Here, by issuing the Policy, Hartford "agree[d] to assume the risk of the insured's liability" in return for Virginia premiums. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1041 (D.C. Cir. 1981). The promise to charge Virginia premiums, of course, was an essential element of the Policy. *See* 44 C.J.S. *Insurance* § 261 (1993) (essential elements of insurance contract include agreement on amount of premium); 43 Am. Jur. 2d *Insurance* § 187 (1982) (same). By permitting Hartford to charge District of Columbia premium rates retroactively based on *Anderson*, the Court of Appeals, in essence, made PFI the insurer and Hartford the insured, for under the Court of Appeals' reading of the Policy, PFI insured Hartford against the risk of an adverse decision in *Anderson* -- a result that stands the Policy on its head.

When the meaning of an insurance policy is at issue, summary judgment is appropriate where the policy admits of only one reasonable interpretation.[7] If the Policy is

[7] *Hughes v. Boston Mut. Life Ins. Co.*, 26 F.3d 264, 269 (1st Cir. 1994)

(Footnote continued)

susceptible to more than one reasonable interpretation, then it is ambiguous, a question of fact is raised, and summary judgment for the insurer is improper. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (summary judgment is appropriate only where "there can be but one reasonable conclusion as to the verdict").

The party seeking summary judgment must, of course, meet the burden of demonstrating the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Moreover, it is well-recognized that "in a summary judgment proceeding the party against whom the burden of proof falls at trial faces a challenge more difficult than otherwise." *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1425 (11th Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).[8] Thus, Hartford, as the plaintiff, bore a substantial burden of demonstrating that its interpretation of the Policy was the only reasonable one.

(Footnote continued)

(summary judgment vacated where insurer's interpretation of policy "is not the only plausible one"); *Fireman's Fund Ins. Co. v. Murchison*, 937 F.2d 204, 208 (5th Cir. 1991) (summary judgment reversed where agreement "is subject to two reasonable interpretations"); *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10 (2d Cir. 1983) (summary judgment reversed because insurance contract "is not wholly unambiguous").

[8] *See National State Bank v. Federal Reserve Bank*, 979 F.2d 1579, 1582 (3d Cir. 1992) ("Where the party moving for summary judgment is the plaintiff, . . . the standard is more stringent."); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) ("[I]f the movant bears the burden of proof on an issue, . . . he must establish beyond peradventure *all* of the essential elements of the claim . . . to warrant judgment in his favor.").

The Court of Appeals, however, improperly lessened Hartford's burden. For example, the court admitted that its interpretation of the Policy rendered one of the Policy's clauses "partially redundant," but defended the interpretation as a "plausible" one. App. 11. Similarly, the Court of Appeals criticized PFI for failing to offer any explanation of why the endorsement requirement of the Policy did not apply to retroactive premium increases. App. 14. The court conceded that it "d[id] not feel qualified to embrace" Hartford's competing explanation, but nonetheless deemed it "a plausible one." *Id.*

The standard on summary judgment, however, is not whether a particular construction of the contract is "a plausible one," but whether it is "the only plausible one." *Hughes v. Boston Mut. Life Ins. Co.*, 26 F.3d 264, 269 (1st Cir. 1994); *see* cases cited *supra* pp. 15-16 n.7. Although the Court of Appeals claimed to be "test[ing] whether our own reading of the contract is indeed the only reasonable construction of its terms," App. 14 n.3, by adopting interpretations that were merely "plausible," the court improperly disregarded the very standard it claimed to be applying.

Moreover, by ordering summary judgment for Hartford based on "plausible" readings of the Policy, the Court of Appeals improperly imposed on Hartford a less strenuous burden than other circuits impose on plaintiffs seeking summary judgment. *See* cases cited *supra* p. 16 n.8. The Court of Appeals compounded its error by, in essence, placing the burden on PFI to disprove Hartford's interpretation of the Policy.[9]

[9]*See* App. 12 ("[A]s Hartford rightly points out, PFI's restrictive reading would illogically bind the insurer to the insured's declaration of address despite misrepresentation, a simple out-of-state move during

(Footnote continued)

To make matters worse, the Court of Appeals' construction of the Policy is not even a plausible one, much less the only reasonable one. The mere fact that a district judge with almost twenty years of experience on the federal bench read the Policy in a manner diametrically opposite from that of the Court of Appeals is evidence that the Court of Appeals' reading is not the only reasonable one. *See Stroehmann v. Mutual Life Ins. Co.*, 300 U.S. 435, 439 (1937); *Thomas v. Mutual Benefit Health & Acc. Ass'n*, 123 F. Supp. 167, 171 (S.D.N.Y. 1954) ("If Judges learned in the law can reach so diametrically conflicting conclusions as to what the language of the policy means, it is hard to see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it."), *aff'd*, 220 F.2d 17 (2d Cir. 1955).[10] Here, PFI respectfully submits that the Court of Appeals' reading ignores the risk-shifting principle of insurance and thus is not a reasonable one, much less the only reasonable one.

(Footnote continued)

the policy year, or an honest error. PFI offers no construction of the policy that applies the retroactive adjustment clause to any of those scenarios. Nor does it explain why the parties would limit the insurer to such alternative remedies as a fraud claim (which would encompass only some misrepresentation cases) or a rise in the mod (which would be prospective only)."); App. 14 ("PFI offers no rationale whatsoever for applying the . . . endorsement requirement to adjustments under the Final Premium Clause."); App. 16 (PFI "has shown no reason to think that it was harmed" by the failure to issue an endorsement).

[10] *Accord Walker v. Fireman's Fund Ins. Co.*, 268 F. Supp. 899, 901 (D. Mont. 1967); *Security Ins. Co. v. Investors Diversified Ltd.*, 407 So. 2d 314, 316 (Fla. Dist. Ct. App. 1981); *George H. Olmsted & Co. v. Metropolitan Life Ins. Co.*, 161 N.E. 276, 277-78 (Ohio 1928); *Jones v. Insurance Co. of N. Am.*, 504 P.2d 130, 133 (Or. 1972); *Alvis v. Mutual Benefit Health & Accident Ass'n*, 297 S.W.2d 643, 645-46 (Tenn. 1956).

In particular, the Court of Appeals' reading of the Final Premium Clause was not reasonable. That clause provides that the premium set forth in the Policy is "an estimate" and the final premium will be determined "by using the actual, not the estimated, [payroll] and the proper classification and rates that lawfully apply to the business and work covered by this policy." App. 20-21. The Court of Appeals held that the Final Premium Clause was unambiguous and that, once the District of Columbia Court of Appeals determined that Redskin players were permitted to receive benefits in the District of Columbia, "only the D.C. classifications and rates would qualify as the 'proper classification and rates that lawfully apply' to the affected employees." App. 8.

Anderson did ***not,*** however, hold that it was no longer "proper" to apply Virginia premium rates, and it certainly did not hold that it was no longer "lawful[]" to apply such rates. As the District Court recognized, *Anderson* was a decision about workers' compensation ***benefits***, App. 35-36; it says nothing whatsoever about the issue of ***premiums*** for workers' compensation insurance. Indeed, Hartford admits "the *Anderson* court did not order The Hartford to apply D.C. rates. . . . The Department of Employment Services has no jurisdiction over insurance and no issue was or could have been presented in the case relating to the premium calculation for the Redskins workers' compensation insurance policies." Hartford Br. at 16. This concession disposes of Hartford's case, for if *Anderson* did not order Hartford to charge District of Columbia rates, then Hartford was not "obligated by law," Complaint ¶ 16, to charge them.

The Court of Appeals nonetheless concluded that the determination in *Anderson* that all Redskin players were

eligible for District of Columbia benefits "entailed a matching change in the 'actual' rates." App. 9-10. The Court of Appeals reasoned that "[t]he logic of any insurance policy, prospective or retrospective, requires premium levels to track expected benefits." App. 8.

To be sure, in setting premiums *prospectively*, insurers seek to have them track benefits. In fact, the Policy contained an "experience modification factor," which allows for prospective adjustments of the premium based on the policyholder's loss experience, *see* App. 5, and Hartford used this factor to increase PFI's premiums during the policy period. App. 28. But if an insurer could calculate premiums *retroactively* to make them track benefits, it would never take any risk at all, because it could always retroactively increase its rates to cover any unexpected losses. Such a result would negate the essential purpose of insurance contracts, namely, the shifting of a risk from the policyholder to the insurer in return for a premium. *See Keene*, 667 F.2d at 1041; 5 *Couch* § 69:2, at 69-7 to 69-8.[11] Furthermore, even if the Court of Appeals were correct, a retroactive premium increase is unnecessary because, thus far, premiums have exceeded benefits by $300,000. Finally, again assuming that the Court of Appeals were correct, Virginia premium rates might still

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[11]The Court of Appeals admitted its reading of the Policy rendered "partially redundant the separate clause governing ordinary, nonjurisdictional, changes to work classifications." App. 11. The Court of Appeals' reading would also render the "experience modification factor" superfluous. Such interpretations violate the principle that a contract should be read "to give 'a reasonable, lawful, and effective meaning to all [the policy's] terms.'" App. 14 (quoting *1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*, 485 A.2d 199, 205 (D.C. 1984)); 2 *Couch* § 21:17, at 21-37.

apply because *Anderson* did not hold players ineligible for Virginia benefits.[12]

The Court of Appeals not only failed to give sufficient weight to the risk-shifting principle but also mistakenly construed the word "rates" in the Final Premium Clause to have a meaning different than it has in the Classifications Clause. The Classifications Clause states that the Policy "shows the rate and premium basis for certain business or work classifications. . . . If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement . . . ." App. 20.

The Classifications Clause addresses the situation where job classifications assigned to particular employees do not accurately represent the nature of the work they are performing (*e.g.*, where an employee classified as a clerical worker is actually playing football). If an employee has been misclassified, the Classifications Clause provides a mechanism for reclassifying him/her properly. Because premium rates vary for different job classifications, when employees are reclassified, the premium rates applicable to those employees will also change. Thus, the term "rates" in the Classifications Clause refers to the proper rate for a particular job classification. Indeed, the parties agree that the Classifications Clause does not address the question of which state's premium rates apply. App. 16 ("[PFI argues that] the Classifications Clause does not cover

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[12]In fact, because players can recover benefits wherever they are injured, a requirement that premiums track benefits retroactively could well mean that an insurer could retroactively increase premium rates depending on where players were injured. Moreover, if courts in different states reached inconsistent determinations as to where players were principally employed, an employer could face conflicting retroactive premium adjustments.

jurisdictional change, and Hartford agrees on that point."); Hartford Br. at 22.

If the term "rates" in the Classifications Clause refers to the rates for particular job classifications, and not the rates for a particular state, then it must have the same meaning in the Final Premium Clause. It is a fundamental rule of contract interpretation that "the same words used in different clauses will be understood to have been used in the same sense." 45 C.J.S. *Insurance* § 364, at 87 (1993).[13]

The Court of Appeals, however, held that the term "rates" in the Final Premium Clause had an "independent meaning" and that equating the use of this term with the term "rates" in the Classifications Clause "sacrifices the fundamental principles of the policy to symmetry -- and a false symmetry at that." App. 9-10. The "symmetry" advocated by PFI, however, is nothing more than a recognition of the black letter rule noted above. Nor does this "symmetry" sacrifice any "fundamental principles of the policy," App. 9, for as PFI has shown, the Final Premium Clause does not require premiums to track benefits retroactively in all circumstances.

Even assuming the term "rates" could have different meanings in the Classifications Clause and the Final Premium Clause, the Court of Appeals still erred when it equated, for purposes of the Final Premium Clause, a "change[] in actual work location" with the change resulting from *Anderson*. *Id.* The court stated that "PFI's restrictive reading would illogically bind the insurer to the

[13] *Accord Shuford Dev. Co. v. Chrysler Corp.*, 449 F.2d 429, 436 (5th Cir. 1971); *Hartford Accident & Indem. Co. v. Case Found. Co.*, 294 N.E.2d 7, 13 (Ill. App. Ct. 1973); 2 *Couch* § 22:42, at 22-90; 4 Samuel Williston, *Williston on Contracts* § 618, at 715-16 (3d ed. 1961).

insured's declaration of address despite misrepresentation, a simple out-of-state move during the policy year, or an honest error" and that "PFI offers no construction of the policy that applies the retroactive adjustment clause to any of those scenarios." App. 12. This statement erroneously assumes that PFI had the burden of offering such a construction in order to defeat summary judgment for Hartford. Assuming ***arguendo*** that PFI had such a burden and that the Final Premium Clause covers an out-of-state move or a misrepresentation, such contingencies, which are wholly within the control of the insured, are radically different from the contingency presented in this case, *i.e.*, a legal determination that Redskin players are entitled to benefits in the District of Columbia. This determination ultimately was beyond the control of either PFI or Hartford. If there is a fundamental principle underlying the Final Premium Clause, it is that Hartford can adjust the final premium for changes in circumstances within the control of PFI. As the Court of Appeals noted, retrospective rating is appropriate where "the insured's activities and the size of its payroll are likely to vary considerably over the course of the policy term." App. 4. For example, if the Redskins increase the payroll for the year, make a clerical worker a football player, or erroneously classify a football player as a driver, the Final Premium Clause would allow Hartford to adjust the final premium. Thus, assuming ***arguendo*** that the Final Premium Clause applies to voluntary changes in circumstances by the insured, it would cover an out-of-state move or a misrepresentation by the insured.

PFI could not, however, control the outcome of *Anderson* (especially in light of PFI's role as a nominal party and Hartford's responsibility for the litigation) or the determinations of other states that players are entitled to

benefits in those states. The Policy, even if read to allow retroactive adjustment for voluntary actions, should not be extended to cover involuntary contingencies. Such contingencies were among the risks shifted to Hartford when PFI purchased the Policy. Just as Hartford could not retroactively increase the premiums if far more claims were filed than expected -- a contingency not within PFI's control and addressed through the experience modification factor -- it cannot now seek to increase retroactively the premiums on the basis that a greater-than-expected level of benefits was required to be paid.

In sum, PFI respectfully submits that the Court of Appeals misconstrued the Final Premium Clause in holding that it unambiguously permitted Hartford to increase PFI's premium rates retroactively based on the *Anderson* decision. The Court of Appeals compounded its error by reaching this decision on summary judgment. For these reasons alone, this Court should grant the Petition.[14]

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[14]The cases the Court of Appeals cited as holding that "the retrospective rate-changing power encompasse[s] erroneous jurisdictional assignments," App. 12-13, are inapposite. Neither case addressed the issues raised by PFI. Rather, in both cases, the insurance policies were significantly different from PFI's Policy. In *D.A.X., Inc. v. Employers Insurance*, 659 N.E.2d 1150 (Ind. Ct. App. 1996), the policy expressly incorporated a rule adopted by the Indiana insurance regulators that provided a means for determining where truck drivers who worked in several states were employed. *See id.* at 1153. No similar rule exists here. Furthermore, *Continental Insurance Co. v. Seppala & Aho Construction Co.*, 430 A.2d 157 (N.H. 1981), is distinguishable because the policy in that case used different language than PFI's Policy. *See id.* at 158-59.

B. The Court Of Appeals Erred In Holding, On Summary Judgment, That Hartford Did Not Have To Issue An Endorsement To Increase Premiums Retroactively Based On *Anderson*

This Court should also grant the Petition because the Court of Appeals misinterpreted the Policy's endorsement requirement and literally read it out of existence. The Policy states, "The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy." App. 20. As noted above, Hartford issued an endorsement for the third policy year, but not for the first two policy years. The District Court held that Hartford's failure to issue an endorsement for the first two policy years retroactively increasing PFI's premiums provided an additional basis for granting summary judgment for PFI with respect to those two policy years. App. 33. The Court of Appeals reversed, explaining that a retroactive premium adjustment pursuant to the Final Premium Clause is not a "'change' of a term of the Policy: it is an *exercise* of a power that a specific policy term -- the Final Premium Clause -- expressly grants the insurer." App. 13-14.

PFI respectfully disagrees. The words of a contract should be construed according to their ordinary meaning, 2 *Couch* § 22:10, at 22-21, and it cannot be denied that a reasonable person would construe a retroactive premium increase of $5.3 million -- more than three times the $1.7 million in premiums that PFI has already paid -- as a "change" in a term of the insurance contract. To deny that the retroactive premium increase was a change in the Policy's terms is to deny PFI the notice of such a change to which it was entitled under the Policy and the opportunity

to find alternative means of insuring the risks it had shifted to Hartford.

Moreover, Hartford's own conduct demonstrates that it believed an endorsement was required for a retroactive increase in the premiums to reflect District of Columbia premium rates. Otherwise, Hartford would never have issued such an endorsement when the District of Columbia Court of Appeals decided *Anderson*. The parties' interpretation of a contract is given great weight in determining its meaning. *See, e.g., Dano Resource Recovery, Inc. v. District of Columbia*, 620 A.2d 1346, 1353 (D.C. 1993) (parties' conduct in performing contract is relevant to ascertaining their intent). Here, given Hartford's issuance of an endorsement, the Court of Appeals should not have decided, on summary judgment, that the Policy was unambiguous and did not require an endorsement to increase the premiums retroactively.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISMISSAL OF PFI'S COMPULSORY COUNTERCLAIMS AS TIME-BARRED

As discussed above, the Court of Appeals held PFI's compulsory counterclaims time-barred. In so doing, the court erred by effectively abrogating the time limits provided in the Federal Rules of Civil Procedure for filing such counterclaims. The timely filing of Hartford's complaint tolled the statute of limitations for the counterclaims. Accordingly, the Court of Appeals' decision on this point should be reversed, and the counterclaims should be remanded for trial.

As the District Court noted, "[i]n viewing a motion to dismiss, . . . [t]he factual allegations of the complaint must be presumed true and liberally construed in favor of

plaintiff [and] [t]he plaintiff is entitled to all favorable inferences which may be drawn from those allegations." App. 37. The Court of Appeals has acknowledged that "a motion to dismiss may be granted on the basis that the action is time-barred only when it appears from the face of the complaint that the relevant statute of limitations bars the action." *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1115 (D.C. Cir. 1985).

Here, PFI unquestionably filed its counterclaims within the time limits specified in the Federal Rules of Civil Procedure. The counterclaims relate back to the date of the timely filing of Hartford's complaint because of the well-recognized rule that the institution of a suit tolls the running of the statute of limitations governing compulsory counterclaims. *See De Vito v. Hoffman*, 199 F.2d 468, 469 (D.C. Cir. 1952). The Court of Appeals acknowledged that "there is considerable law (and sensible policy) on PFI's side," App. 17, but held that the District of Columbia follows the minority rule, as purportedly expressed in *Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826 (D.C. 1972).

Sears, however, did not even cite *De Vito*, for *Sears* involved a different issue: whether portions of an amended counterclaim related back to earlier dismissed counterclaims. The *Sears* court held that, to the extent the amended counterclaim restated claims made in the original counterclaim, it did relate back. *Sears*, 290 A.2d at 831. To the extent that the amended counterclaim attempted to add new causes of action which were not asserted in the initial counterclaim, however, it did not relate back. *Id.* The court did not consider whether the filing of a complaint tolls the statute of limitations for the initial filing of compulsory counterclaims. Thus, the controlling

precedent is not *Sears*, but rather *De Vito*. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

The approach reflected in *De Vito* and other cases that follow the majority rule "precludes plaintiff, when the claim and counterclaim are measured by the same period, from delaying the institution of the action until the statute has almost run on defendant's counterclaim so that it would be barred by the time defendant advanced it." 6 Charles Alan Wright et al., *Federal Practice and Procedure: Civil 2d* § 1419, at 152-53 (1990) ("Wright and Miller"). Applying *De Vito* here would enable the Court to implement the "sensible policy" recognized by the Court of Appeals and by Wright and Miller. By contrast, the approach advocated by Hartford and applied by the Court of Appeals would allow precisely the result that Wright and Miller warns about: a plaintiff could wait until just before the statute runs, file its complaint, and then prevent the defendant from filing any compulsory counterclaims on the ground that they are untimely.

Indeed, were Hartford correct, PFI would have had to forgo filing its motion to dismiss (a right expressly granted by Fed. R. Civ. P. 12) and bring its counterclaims in the less than two-day period between Thursday, October 20, 1994, when Hartford served the complaint on PFI's agent, and midnight Friday, October 21, because the statute ran on Saturday, October 22, when the courthouse was, of course, closed. Such a result is clearly at odds with the Federal Rules of Civil Procedure, which state that a party does not have to answer until the court rules upon any motion to dismiss and further contemplate that the counterclaim will be filed with any answer. *See* Fed. R. Civ. P. 12(a)(4)(A), 13(a). Moreover, if Hartford had waited until midnight on October 21 (which, as noted

above, was the day just before the statute ran), there literally would have been no time at all for PFI to file a compulsory counterclaim. Plainly, that cannot be the law. In addition, such a rule would be bad policy. It would force a party like PFI to initiate a claim it would rather forgo purely out of fear that a party like Hartford would wait until the eleventh hour to bring a lawsuit so as to preclude the filing of a timely counterclaim. Such a rule would thus spawn litigation rather than discourage it. Plainly, that cannot be the law either. Hartford's motion to dismiss on statute of limitations grounds should have been denied, and PFI respectfully submits that this Court should reverse on this issue and remand for a trial on the merits of PFI's counterclaims.

CONCLUSION

For all the reasons set forth above, PFI respectfully requests that this Court grant the Petition and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 3, 1997 Decided October 28, 1997

No. 96-7215

HARTFORD ACCIDENT & INDEMNITY COMPANY,

APPELLANT/CROSS-APPELLEE

v.

PRO-FOOTBALL, INC., D/B/A
WASHINGTON REDSKINS,

APPELLEE/CROSS-APPELLANT

Consolidated with
No. 96-7222

Appeals from the United States District Court
for the District of Columbia
(No. 94cv02266)

Mark E. Solomons argued the cause for appellant/cross-appellee. With him on the brief was *Michael R. Goodstein*. *Paul H. Friedman* entered an appearance.

Barry W. Levine argued the cause for appellee/cross-appellant. With him on the brief was *Mark A. Packman.*

Before: WALD, WILLIAMS and GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Concurring opinion filed by *Circuit Judge* WALD.

WILLIAMS, *Circuit Judge*: This case deals with a so-called "retrospective rating" insurance policy, evidently a type common for workers' compensation. The insured employer pays an estimated premium, which is typically based on data about the insured's payroll and the classifications of its employees for risk purposes, and which is subject to later correction. The classifications of course vary radically by activity; here, for example, the initial rate per $100 of payroll for "athletic team or park--contact sports"--the policy was issued to the owner of the Washington Redskins--was nearly 40 times the premium for "clerical office employees." The rates, fixed by law, also vary markedly according to the jurisdiction where employees may routinely seek compensation, depending on benefit levels and likelihood of recovery in the jurisdiction. They are, for example, far higher in the District of Columbia than in Virginia--more than double in this case. Both jurisdictions allow recovery by an employee who is injured within their respective borders or whose employment is principally located there.

The policy calls for initial payment of an estimated premium, to be followed by adjustments to reflect actual circumstances. Here, during the third of three successive one-year policies, the District of Columbia Court of Appeals affirmed the decision of the D.C. Department of Employment Services that the players performed "the

principal services for which they were hired" in the District, where they played their home games (R.F.K. Stadium), rather than in Redskins Park in Virginia, where they spend a majority of their time at practice. *Pro-Football, Inc. v. D.C. Department of Employment Services,* 588 A.2d 275 (D.C. 1991) (*"Anderson"*--so-called after one of the player claimants). The players were thus entitled to invoke D.C. law as a basis for recovery for injuries occurring anywhere (as the players had sought throughout the period of the three policies).

The parties agree that the provisions on premium adjustment allow the insurer to make a retrospective premium change to reflect changes in the employer's payroll or in the job classifications of particular employees. The question is whether the terms of the policy also permit a premium adjustment for a change in the jurisdiction whose law is available to employees, such as resulted from the *Anderson* decision. The district court read the policy as denying the insurer such a power. We reverse.

* * *

Hartford Accident and Indemnity Company provided the Washington Redskins' owner/operator, Pro-Football, Inc. ("PFI"), with a workers' compensation insurance policy for three successive annual policy periods, from July 14, 1988 to July 14, 1991. The policy was a standard form, assigned risk policy administered by the National Council on Compensation Insurance ("NCCI"), designed for employers like PFI who cannot purchase coverage on the voluntary workers' compensation market and who cannot or are not willing to self-insure. See generally 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §§ 92.53-92.65 (1997) (describing assigned risk, retrospective rating policies).

Under the policy, PFI's premiums were initially based on the parties' use of Virginia as the expressly assumed principal location of the players' services.

Under both the District of Columbia and the Virginia workers' compensation insurance plans ("WCIPs"), the NCCI directs insurers in the state pool to issue coverage to employers eligible for assigned risk insurance. When PFI submitted an application for Virginia assigned risk coverage, NCCI assigned the application to Hartford, which was obligated to issue a policy. The policy issued by Hartford consisted of manuals (by reference), standard forms, an Information Page (actually several pages) of figures specific to PFI, and rates; the forms and manuals were approved, and the rates set, by NCCI. (The policy forms for the District and Virginia WCIPs are identical in all material respects.) The terms and rates for the policy were not negotiated; neither Hartford nor PFI could legally have altered them.

Retrospective rating plans of the sort embodied in this policy are used when the size of the insured's risks is difficult to measure at the beginning of the policy period, see Lee R. Russ & Thomas F. Segalla, 5 *Couch on Insurance* § 69.15 (3d ed. 1996) (*"Couch"*). Courts routinely enforce the retrospective provisions in such plans. See, e.g., *L.C. Worley v. Travelers Indemnity Co.*, 183 S.E.2d 91 (Ga. Ct. App. 1971); *Great American Ins. Co. v. Nova-Frost, Inc.*, 362 N.W.2d 358 (Minn. Ct. App. 1985); *Texas Soap Mfg. Co. v. American Auto. Ins. Co.*, 227 S.W.2d 376 (Tex. Civ. App. 1950). Workers' compensation in general, and professional football in particular, present the kind of uncertainty that makes retrospective rating appropriate, because the insured's activities and the size of its payroll are likely to vary considerably over the course of the policy term.

Premiums under the policy are calculated as the product of the work classification rate for a specific jurisdiction and the amount of payroll allocated to employees in that classification and jurisdiction (the "premium basis") up to a regulated maximum amount. Initial premiums (at least for years other than the first one) also incorporate an "experience modification factor" (or "mod"), a prospective adjustment to take account of prior years' claims experience for the particular employer. All the factors other than actual payroll -- the rates, class ifications, premium basis maxima, and mod--are set by NCCI.

Following attempts by several injured Redskin players to collect the higher District benefits for injuries received outside the District, the Director of the District of Columbia Department of Employment Services ruled on or about July 10, 1989, just before the end of the first policy year, that the players' place of principal employment was the District rather than Virginia. The D.C. Court of Appeals issued its decision in *Anderson*, affirming the Director, in March 1991.

Hartford, relying upon the policy provision that allowed calculation of the "final premium" after the policy's expiration, then wrote PFI that it had reclassified Redskin players and coaches as District of Columbia employees for all three policy years. For the then-current policy year, 1990-91, Hartford issued an endorsement, or formal amendment, implementing the reclassification. Hartford then billed PFI for the difference in premium levels--a difference, after adjustments, of $5,350,762. PFI refused to pay, and Hartford filed suit under the federal courts' diversity jurisdiction. PFI counterclaimed for breach of contract and fiduciary duty, fraud, bad faith, and negligent misrepresentation.

On cross-motions for summary judgment the district court granted summary judgment for PFI, ruling that the policy did not permit Hartford to change the jurisdictional basis of the premium calculation retroactively. *Hartford Accident & Indemnity Co. v. Pro-Football, Inc., d/b/a The Washington Redskins*, No. 94-2266 (D.D.C. Aug. 21, 1996) ("Mem. Op."). The district court also suggested that any reclassification might have to be by formal endorsement, which Hartford had failed to issue except for the final policy year at issue. Finally, the district court struck the affidavit of a Hartford expert because it was submitted after the close of discovery, and rejected PFI's counterclaims as time-barred under the District's statute of limitations. All of these decisions are on appeal.

I.

The district court noted, and the parties agree, that the task in contract interpretation is to decide "what a reasonable person in the position of the parties would believe the language meant." Mem. Op. at 8 (citing *1010 Potomac Assoc. v. Grocery Mfrs. of America, Inc.*, 485 A.2d 199, 205 (D.C. 1984)). In the particular context of insurance, under District of Columbia law,

> [s]ince insurance contracts are written exclusively by insurers, courts generally interpret any ambiguous provisions in a manner consistent with the reasonable expectations of the purchaser of the policy. However, when such contracts are clear and unambiguous, they will be enforced by the courts as written, so long as they do not 'violate a statute or public policy.'

Smalls v. State Farm Mut. Auto. Ins. Co., 678 A.2d 32, 35 (D.C. 1996) (citations omitted). See also *GEICO v. Fetisoff*, 958 F.2d 1137, 1141 (D.C. Cir. 1992) ("Under District of Columbia law, '[c]lear and unambiguous language [in an insurance policy] should be construed according to its everyday meaning.'") (quoting *Continental Casualty Co. v. Cole*, 809 F.2d 891, 896 (D.C. Cir. 1987)). Thus, as we understand District law, no preference for the insured's reading arises unless the contract is ambiguous, and even then the preference involves no more than accepting what the insured might reasonably believe over an alternative reasonable interpretation offered by the insurer.

The parties also wrestle with the issue of whether the special status of this insurance contract--imposed on the parties as NCCI's standard form--calls for any modification of the standard rule for interpreting insurance contracts. Commentators have urged, and many (perhaps most) jurisdictions have agreed, that since the basis for the standard rule--the insurer drafted the contract without negotiating it with the insured--is absent, the presumption in favor of the insured's reasonable interpretation should be relaxed: "The rule of construction against the insurer does not apply where . . . the language was prescribed by statute and controlled by Division of Insurance rather than the individual insurer." 2 *Couch* § 22:15. See also John A. Appleman & Jean Appleman, 13 *Appleman Ins. L. & P.* § 7407 (1981) ("While North Carolina and a few other states still apply the doctrine of construing policies against the insurer to instances of standard policies, the better authority is to the effect that the doctrine of liberal construction has no place under those circumstances.").[1]

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[1]Accord, e.g., *Kisting v. Westchester Fire Ins. Co.*, 290 F.Supp. 141, 147 (D.C. W.D. Wis. 1968), aff'd, 416 F.2d 967 (6th Cir. 1969)

There appears to be no District of Columbia precedent on the construction of state-mandated policy language or forms. In any event, because we do not find the language ambiguous, or as reasonably permitting PFI's proposed interpretation, we need not resolve that contest.

We now turn to interpreting the policy itself. (The text of the key printed provisions of the policy--the "boilerplate"--is set forth in the Appendix.)

Did the Final Premium Clause entitle Hartford to adjust the premium for jurisdictional change?

The Final Premium Clause explicitly describes the premium shown on the Information Page as "an estimate" and states that the "final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy." Hartford's decision to charge District rates for the players and coaches in 1991 in the wake of *Anderson* tracks these terms. Thereafter, only the D.C. classifications and rates would qualify as the "proper classification and rates that lawfully apply" to the affected employees. The logic of any insurance policy, prospective or retrospective, requires premium levels to track expected benefits.[2] A retrospective-rating policy allows post-signature events to affect both sides of the balance. Here Hartford accounted for a large, legally mandated, rise in benefit levels through

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(applying Wisconsin law); *Hankins v. Public Service Mut. Ins. Co.*, 63 A.2d 606 (Md. 1949); *Charles Dowd Box Co. v. Firemen's Fund Ins. Co.*, 351 Mass. 113, 218 N.E.2d 64 (1966); *Del Guidici v. Importers' & Exporters' Ins. Co.*, 120 A. 5 (N.J. 1923).

[2]As used here, "expected" refers to the average of possible outcomes, each specific outcome discounted for its probability.

an appropriate adjustment to its premium calculation, as the policy contemplated.

The district court came to a contrary conclusion--here urged on us by PFI--by treating the Final Premium Clause as limited by the Classifications Clause. It read the latter as contemplating only changes to business and work classifications (and the rate and premium basis changes that follow a classification change). It then read the Final Premium Clause as permitting Hartford to make only two types of independent changes to the policy factors: changes to premium basis (payroll) determined under the Audit Clause, and changes to work classifications determined under the Classifications Clause; rate adjustments would be restricted to the consequences of changes in these two types of factors. Mem. Op. at 9-11. This interpretation left no room in the Final Premium Clause for a change in rates corresponding to a change in the workers' jurisdictional basis, whether the change arose from an exogenous legal event such as the *Anderson* decision, or from changes in actual work location (or new information about work location) such as might be revealed during the audit process.

This reading sacrifices the fundamental principles of the policy to symmetry--and a false symmetry at that. The Final Premium Clause calls comprehensively for retrospective adjustment of the premium to conform to "the actual . . . premium basis and the proper classification and rates that lawfully apply." Here the D.C. Court of Appeals reached a conclusive (and retroactive) determination that the jurisdictional predicate of the players' benefit eligibility was not, in fact, Virginia, but rather the District of Columbia. Hartford correctly concluded that the change in the jurisdictional predicate for benefits entailed a matching change in the "actual"

rates. PFI's reading, by contrast, rewrites the phrase "proper classification and rates" to eliminate any independent meaning for "rates."

We see no basis for the assumption that the Audit Clause--authorizing inspection of the insured's books for up to three years after the policy period for information to "be used to determine final premium"--must refer solely to changes in premium basis (i.e., payroll limited by the NCCI-imposed maxima). Mem. Op. at 10. An audit might reveal, as Hartford's apparently did, see Appendix for PFI on Cross-Appeal at 106, that all claims by players are being filed in another jurisdiction. Since it is the function of the Audit Clause to gather data for the correct calculation of the premium, it would be arbitrary to perform the final premium calculation in disregard of a highly relevant fact so gathered, simply because the scope of the Classifications Clause is limited to changes in classifications.

In fact, the Information Page states, "All information required below is subject to verification and change by audit." The information set forth "below" included rates calculated for various job classifications on a jurisdiction-specific basis, so that the natural, indeed inescapable, reading is that the provision for change applies to the jurisdictional as well as the other aspects of the premium calculation. By contrast, on a narrow reading of the Audit Clause's scope, it remains mysterious how information relevant to the Classifications Clause will be gathered except through the insured's goodfaith disclosure. But under a harmonious reading of the three clauses, the Audit Clause has potential to generate data for all aspects of the Final Premium calculation, as well as for reclassifications under the Classifications Clause.

Granted, our construction of these clauses makes partially redundant the separate clause governing ordinary, nonjurisdictional, changes to work classifications. Why should such changes be addressed not only in the Audit and Final Premium Clauses, but also in a special clause of their own, the Classifications Clause? One plausible answer is that changes sought by the insurer to work classifications may be likely to engender the greatest resistance by the insured, and may be the most disputable, so the function of the special Classifications Clause is just to underscore the insurer's power to make those changes. In any event, PFI's reading of the clause to suggest that it puts jurisdictional changes entirely off the map presents a far greater anomaly, for under PFI's reading the insurer would be unable to adjust for a change in one of the most significant elements in its exposure.

PFI appears to believe that somewhere in the policy Hartford promised that the rates for players would be calculated on the assumption that Virginia was their principal place of employment, regardless of whatever might prove the case. It is not clear just where PFI finds any such promise. One possibility is the page of the Information Page that covers the players (as well as the clerical staff working at Herndon and the athletic team operational staff), which says, as a heading: "Named Insured and Location Address of Operations Covered by this Schedule," together with the address of the Herndon facility. (A similar page covers those understood to be working in the District.)

Far from representing any promise, however, the heading appears to be no more than a device for organizing information, framing the then-estimated classifications, rates and payroll for the workers thought to be located at the places shown on the particular pages.

Furthermore, as Hartford rightly points out, PFI's restrictive reading would illogically bind the insurer to the insured's declaration of address despite misrepresentation, a simple out-of-state move during the policy year, or an honest error. PFI offers no construction of the policy that applies the retroactive adjustment clause to any of those scenarios. Nor does it explain why the parties would limit the insurer to such alternative remedies as a fraud claim (which would encompass only some misrepresentation cases) or a rise in the mod (which would be prospective only).

Courts in other jurisdictions, faced with similar or identical policy language, have held that the retrospective rate-changing power encompassed erroneous jurisdictional assignments. In *D.A.X., Inc. v. Employers Ins. of Wausau*, 659 N.E.2d 1150 (Ind. Ct. App. 1996), the insurer discovered that the policy's jurisdictional assumption was wrong. The insured, an employee-leasing company, had declared that its operations were entirely in Indiana, because of its office location. Because the insurer found that claims were being filed in Illinois, it launched an audit under the standard Audit Clause, concluded that under rules promulgated by NCCI the correct site was Illinois, and accordingly adjusted the premium. The trial court enforced the insurer's claim to the higher premium. On appeal the insured claimed that the trial court judgment had wrought an unconstitutional "impairment" of contract and an unjustified contract reformation. The appellate court rejected both theories, finding that the trial court "simply enforced the contract the way it was written." *Id.* at 1156. The court read the Final Premium Clause (identical to the clause at issue here) as permitting the insurer to use the "rates and classifications from such other

states as may lawfully apply," which, given the NCCI rating rule, meant the Illinois rates. *Id.* at 1157.

And in a New Hampshire case also involving a retrospective rating policy, with language similar though not identical to ours, the insurer discovered during its post-policy audit that many of the insured's employees, classified as working in New Hampshire, had in fact been working in Massachusetts, and accordingly recalculated the premium. *Continental Ins. Co. v. Seppala & Aho Constr. Co., Inc.,* 430 A.2d 157 (N.H. 1981). A clause--the counterpart of our Final Premium Clause--stated that "the earned premium," as opposed to the initial "estimated premium," "shall be computed in accordance with the rule, rates, rating plans, premiums and minimum premiums applicable to this insurance." *Id.* at 158. The court held that this clause clearly and unambiguously gave the insurer the power to re-rate the policy with a corrected jurisdictional classification--indeed, to the point of making clear that the insurer's agent had no authority to represent that only New Hampshire rates would be charged. *Id.* at 159. We agree with these decisions.

Must Hartford's power to correct the premium be exercised through an endorsement?

There are two provisions that might give rise to an obligation by Hartford to exercise its premium-revising power by means of an endorsement. First, PFI relies on Subsection A of the "General Section," which provides that the "terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy."

But we do not see the insurer's exercise of the power expressly granted by the Final Premium Clause as the "change" of a term of the Policy: it is an *exercise* of a

power that a specific policy term--the Final Premium Clause--expressly grants the insurer to use "the ***actual, not the estimated***, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy" (emphasis added). That, of course, was the view of the courts in *D.A.X.* and *Continental Insurance*. Moreover, the Final Premium Clause expressly says that the final premium "will be determined after this policy ends." It seems odd to say that an activity explicitly slated to occur after the policy "ends" constitutes a "change" of the then-expired policy's terms. (PFI's theory, incidentally, further entails--implausibly, given the Audit Clause--that application of the Final Premium Clause to correct premium basis would also require an endorsement.) Because PFI's reading of Subsection A fails to accord independent force to the Final Premium Clause, it fails to give "a reasonable, lawful, and effective meaning to all [the policy's] terms." *1010 Potomac Assoc.*, 485 A.2d at 205.

Moreover, PFI offers no rationale whatsoever for applying the General Section endorsement requirement to adjustments under the Final Premium Clause. Hartford, by contrast, suggests that endorsements are issued only during a policy's term, and that the purpose of the requirement is to provide notice to the insured to enable it to decide either to cancel or at least not to renew the policy. We do not feel qualified to embrace that view, but it is, at least, a plausible one.

We can imagine two ways that a post-expiration endorsement requirement might possibly have some purpose beyond that contributed by the final billing itself.[3]

[3]Although these arguments were not advanced by either party, we raise them ourselves in order to test whether our own reading of the contract is indeed the only reasonable construction of its terms.

First, an endorsement requirement might make it easier for insurance regulators to monitor assigned risk policies in their jurisdictions, as is apparently the regulators' charge under the D.C. WCIP. See D.C. WCIP at 9 ("The Plan Administrator shall monitor and review servicing carrier performance by . . . (3) conducting on-site audits; and (4) reviewing any other information that relates to the servicing carrier."). Both D.C. and Virginia require that copies of the policy declarations "and all endorsements" must be filed with the appropriate administrator, see D.C. WCIP at 7, Virginia WCIP at 2.

But if regulators want information on ultimate premiums paid, a requirement of endorsements for jurisdictional changes under the Final Premium Clause is a strangely incomplete solution. We know that the final bill will reflect changes to estimated payroll, but even PFI does not contend that a post-expiration, ordinary correction of the payroll constitutes a "change" to the policy, such as to warrant formal endorsement. Either the regulators do not depend on a formal endorsement process for their information-gathering needs, or they don't monitor the policies as closely as this suggestion assumes.

A second possible justification for requiring post-policy jurisdictional adjustments to take the form of endorsements might look to the interests of employee-claimants. *If* the jurisdictional possibilities open to claimants were governed by the insurance contract, specification of jurisdictional change in an endorsement might make it easier for claimants to ascertain their appropriate jurisdictional bases. Of course, the premise is faulty. Claimants' jurisdictional options depend on state law, as *Anderson* shows, not on arrangements between the employer and its insurer.

Thus an endorsement attached to a final premium billing, issued after the expiration of a policy, would perform no notice function beyond that of the billing itself. It would be a purely formal gesture.

Unsurprisingly, PFI has shown no reason to think that it was harmed by Hartford's non-issuance of an endorsement when it made its final billing for the expired terms.[4] By contrast, Hartford's behavior in issuing an endorsement only to the current 1990-91 policy year is consistent with the rationale for the requirement: it provided PFI with notice in case it should wish to find other insurance or self-insure in the future (as apparently it chose to do).

An alternative source of an endorsement requirement would be the Classifications Clause's statement that if exposures are different from those described by the estimated classifications, "we will assign proper classifications, rates and premium basis *by endorsement to this policy*" (emphasis added). Since PFI's position rests heavily on a notion that the Classifications Clause does not cover jurisdictional change, and Hartford agrees on that point, it seems plain that it cannot be a source of any endorsement obligation that would be applicable here.

Accordingly, we reverse the grant of summary judgment in favor of PFI and remand for the district court to enter summary judgment for Hartford.

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[4]PFI does claim that it was injured by Hartford's not having issued an endorsement immediately after the Director's initial adverse *Anderson* decision and instead waiting until the D.C. Court of Appeals ruling to change the policy rates. Whatever the merits of this defense, it depends entirely on the *timing*, not the *form*, of Hartford's action and was not the basis of the district court's ruling.

II.

The district court rejected PFI's counterclaims as time-barred by the District of Columbia statute of limitations. Since PFI's claims arise under District law, the applicable statute of limitations is also that of the District. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Kuwait Airways Corp. v. American Security Bank, N.A.*, 890 F.2d 456, 460 (D.C. Cir. 1989). This is true even though Rule 12(a)(4) of the Federal Rules of Civil Procedure extends the time for a responsive pleading to ten days after the denial of a motion under Rule 12, and PFI advanced its counterclaim in an answer timely filed under that rule. See 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* 1419 (2d ed. 1990, Supp. 1997).

An agreement between the parties tolled the statute until October 22, 1994; PFI's answer and counterclaim were filed a year later. But Hartford filed its complaint on October 20, 1994, and defendant argues that this further tolled the statute. While there is considerable law (and sensible policy) on PFI's side, the controlling law--that of the District--is against it.

In *Sears, Roebuck and Co. v. Goudie*, 290 A.2d 826 (D.C. 1972), the court considered whether a counterclaim filed too late (assuming no tolling) could be saved by the doctrine of relation back to a prior, timely counterclaim that had been dismissed on substantive grounds. The court found no relation back because the new counterclaim was insufficiently related to the dismissed one. *Id.* at 830. A necessary premise of the entire discussion was that the filing of the complaint did *not* toll the statute on the counterclaim. And the court made this premise specific, saying that a genuine counterclaim, i.e.,

one going "beyond matters of defense" such as recoupment, "must be viewed as an affirmative cause of action and *should therefore be tested apart from the primary claim in determining whether the statute of limitations would bar the counterclaim." Id.* (emphasis added). This superseded the contrary, more lenient, rule of *De Vito v. Hoffman,* 199 F.2d 468 (D.C. Cir. 1952). Because PFI's counterclaims concededly go "beyond matters of defense," they must be assessed separately, and thus fail.

III.

In the course of its ruling on the cross motions for summary judgment, the court held that the parties' failure to observe discovery rules--specifically failure to request extension of a discovery deadline--barred use of experts' affidavits submitted to bear upon the construction of the policy. Mem. Op. at 12 n.10. Hartford contests the exclusion of its expert's affidavit.

Hartford's contention appears moot--at least in the sense that, as we have construed the portions of the policy relevant to this appeal without consideration of any extrinsic evidence, such evidence can make no contribution to resolution of the case. Hartford suggests, however, that we should address the court's discovery ruling because, even if it wins on the basic issue of its power to adjust the premium by reference to jurisdictional mistake, as it has, "[d]amages would still need to be addressed."

At the time the district court exercised its discretion in ruling on this discovery issue it was simultaneously making summary judgment rulings that brought the case to a complete end (subject, of course, to appellate review). We do not know if that circumstance colored the court's ruling on the issue. Rather than entangle ourselves in what is surely a messy issue, and perhaps a completely

unnecessary one, we simply note that *if* indeed there are remaining factual issues to be resolved on remand, the court may wish to re-examine its discovery ruling.

* * *

Accordingly, the judgment of the district court is reversed in part and affirmed in part, as stated above.

So ordered.

General Section

A. The Policy

This policy includes at its effective date the Information Page and all endorsements and schedules listed there . . . . The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

Part Five--Premium

A. Our Manuals

All premium for this policy will be determined by our manual of rules, rates, rating plans and classification. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. Remuneration

Premium for each work classification is determined by multiplying a rate times a premium basis . . . .

E. Final Premium

The Premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance . . . .

G. Audit

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium . . . .

WALD, *Circuit Judge, concurring*: I differ with the reasoning of the majority on only one aspect of this case, the issue of whether the Final Premium Clause should be read to permit Hartford to change the jurisdictional basis of closed policies without issuing an endorsement.

I find the evidence on which the majority relies on this issue--policy language, caselaw, and the purported lack of any reason for requiring endorsements to closed policies--unconvincing. The language of the Final Premium Clause seems to me to be ambiguous. It could be read to provide the insurer with only a substantive *right* to adjust the terms of a closed policy, or it could also furnish a specific *procedure* for doing so, and so excuse compliance with the General Section's endorsement requirement. As for the cases cited by the majority, *D.A.X., Inc. v. Employers Ins. of Wausau*, 659 N.E.2d 1150 (Ind. Ct. App. 1996) and *Continental Ins. Co. v. Seppala & Aho Constr. Co.*, 430 A.2d 157 (N.H. 1981), in neither of them does it appear that any party raised the question of whether an endorsement was required to effect a change in policy terms. (Indeed, the policies involved may not have even contained an endorsement requirement like the one here.) Nor do I agree with the majority's conjecture that requiring endorsements to closed policies would be a "purely formal gesture." Majority opinion at 13. Formality can, at times, be very useful. The record now before us contains little evidence about the practices of the insurance industry or the usual behavior of regulators, and the parties did not argue this issue in any detail. We simply cannot be certain that insurers, insureds, and third parties would have no use for endorsements to closed policies.

Ultimately what I find dispositive in this case is that the parties' course of performance under the policy

indicates that they appeared to have implicitly agreed that the Final Premium Clause permitted changes in policy terms without an endorsement. "[E]vidence of circumstances surrounding the contract formation *and the parties' conduct in performing it* is relevant to ascertaining their intent." *Dano Resource Recovery, Inc. v. District of Columbia*, 620 A.2d 1346, 1653 (D.C. 1993) (emphasis added). In October 1989, after the 1988-89 policy had closed, Hartford audited that policy year and issued a "Statement of Premium Adjustment," presumably under the Final Premium Clause, which set forth revised figures for PFI's payroll and associated adjustments to the policy premium. No corresponding endorsement is appended to the copy of the 1988-89 policy that appears in the record. I find this to be strong enough evidence that the parties read the Final Premium Clause as providing both a substantive right to change policy terms and a procedure for effecting such changes to concur with the result reached by the panel.[1]

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[1]I agree with the panel majority that we need not decide whether the doctrine that ambiguities in a contract are construed against its drafter applies in this case. In discussing this issue in dicta, however, the majority observes that it is unclear how District of Columbia law would treat state-mandated policy language. In fact, NCCI, the entity that drafted the policy language, appears to be dominated by the insurance industry. *See* William Hager, *Data Value Depends on Accuracy, Not 'Independence'*, NAT'L UNDERWRITER PROP. & CAS. RISK & BENEFIT MGMT., Dec. 13, 1993 (stating that, of twenty-one seats on NCCI's board of directors, all but four are occupied by insurance industry representatives). The question, therefore, might be better framed as how District of Columbia law would treat a policy whose use is mandated by law, but which was ultimately drafted by an entity with interests closely aligned with those of the insurer.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Plaintiff,

v.

PRO-FOOTBALL, INC., d/b/a THE WASHINGTON REDSKINS,

Defendant.

Civil Action
No. 94-2266 (JHG)

FILED
AUG 21 1996
Nancy Mayer-Whittington, Clerk
U.S. District Court

JUDGMENT

In accordance with the Memorandum Opinion and Order issued this date, judgment is hereby entered against plaintiff, Hartford Accident and Indemnity Company, and in favor of defendant, Pro-Football, Inc. on the complaint.

IT IS SO ORDERED.

August 21, 1996

Joyce Hens Green /s/
JOYCE HENS GREEN
United States District Judge

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MEMORANDUM OPINION AND ORDER

Presently pending are cross motions for summary judgment on the complaint, as well as plaintiff Hartford Accident and Indemnity Company's ("Hartford's") Motion to Dismiss defendant Pro-Football, Inc.'s ("Pro-Football's") counterclaims. For the reasons set forth below, Pro-Football's motion for summary judgment on the complaint is granted, and Hartford's motion for partial summary judgment is denied. Hartford's motion to dismiss Pro-Football's counterclaims is granted.

I. BACKGROUND

From July 14, 1988 through July 14, 1991, Hartford, a national insurance company, provided workers compensation insurance to Pro-Football, which operates

the Washington Redskins professional football team.[1] The insurance was provided through the state of Virginia's workers compensation insurance plan ("WCIP"), which makes insurance arrangements through an "assigned risk pool" for employers who are not commercially insured or self-insured.[2] The Virginia WCIP is administered by the National Council on Compensation Insurance ("NCCI").

Pro-Football applied for insurance through the Virginia WCIP, and represented in its application that most of its employees, including the Redskins football players, were Virginia employees, in that the majority of their time is spent at the Redskins' practice facility in Virginia. NCCI, as administrator of the Virginia WCIP, directed Hartford to issue a workers compensation policy to Pro-Football, which Hartford did effective July 14, 1988.[3] The policy was renewed in the two subsequent years.

Under the WCIP, employers and insurers are obligated to utilize a form policy, which neither party has the authority to modify. The policy is supplemented with

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[1] This background discussion is drawn largely from the parties' Joint Stipulations of Fact.

[2] In order to obtain insurance through the WCIP, an employer must demonstrate that it applied to and was rejected by at least two commercial insurers, which was the case for Pro-Football. Additionally, Pro-Football was not eligible to self-insure because the owner of the Redskins, Jack Kent Cooke, refused to disclose the financial information required to demonstrate his financial ability to guarantee the payment of workers compensation benefits to his employees.

[3] In return for providing workers compensation insurance to employers through the WCIP, insurers receive a fee, which is a percentage of the policy's premiums. The fee percentages are considerably higher in the District of Columbia than in Virginia.

several information pages and endorsements which contain information specific to Pro-Football and its employees. The policy issued to Pro-Football by Hartford groups employees into three separate classifications: 1) contact sports (i.e., football players), (2) operations and drivers, and (3) clerical employees. As noted previously, Pro-Football stated that Redskins players were Virginia employees for purposes of workers compensation. Hartford did not believe such a classification was improper; accordingly, the policy utilized this classification and applied Virginia rates. Subsequent renewal policies issued on July 14, 1989 and July 14, 1990 similarly classified Redskins players and coaches as Virginia employees, and applied Virginia rates. A small number of Pro-Football's clerical employees who work at RFK Memorial Stadium were classified as District of Columbia employees. Accordingly, different rates were utilized in the policy for different groups of employees.[4]

Workers compensation premiums are calculated by multiplying a portion of the employer's payroll, i.e., the "premium basis," by the applicable rates for the particular job classification. The rates vary according to jurisdiction and classification. An insurer providing coverage through the WCIP cannot deviate from the rates and classifications established by a particular jurisdiction. The premium actually paid by Pro-Football was calculated using rates and rating rules established and approved by Virginia (as to contact sports) and the District of Columbia (as to clerical staff).

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[4] Virginia's workers compensation premium rates are lower than the District of Columbia's. Moreover, different rates apply to different work classifications, to account for the varying degrees of risk faced by workers in different jobs.

Premiums can be adjusted during the current policy year through an experience modification factor, which reflects an employer's actual past loss experience. The modifier is computed by NCCI. Thus, generally speaking, if claims and benefit payments exceed the insurer's estimates, the insurer may apply an experience modification factor, if approved by NCCI, and prospectively increase an employer's premiums. Hartford utilized the experience modifier to increase Pro-Football's premiums during the three years the policies were in effect.

Prior to the issuance of the 1988 policy, some Redskins players had asserted claims for workers compensation benefits under the District of Columbia's workers compensation law, which provides more generous benefits than Virginia.[5] Pro-Football and Hartford's predecessor, Fireman's Fund, had challenged such claims. Hartford became aware of the claims during the first policy year, and it too challenged them, along with Pro-Football. However, on or about July 10, 1989, the Director of the District of Columbia's Department of Employment Services ("DOES") ruled that some Redskins players were eligible for District of Columbia workers compensation benefits. Subsequent cases reached the same result. A number of these cases were consolidated for purposes of appeal. In March 1991, the District of Columbia Court of Appeals affirmed the Director's decision that the employment of Redskins players who played at RFK Memorial Stadium was "principally localized" in the District of Columbia, and, as such, these players were entitled to D.C. workers compensation benefits, regardless of where their injuries occurred. Pro-Football, Inc. v.

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[5] Interestingly, each policy contains an "interstate experience modification," which suggests that Hartford took into account the possibility of claims being paid in multiple jurisdictions.

Dep't of Empl. Serv., 588 A.2d 275 (D.C. 1991) (hereafter referred to as the Anderson case).

Subsequently, Hartford notified Pro-Football that in light of the Anderson decision, it was reclassifying Redskin football players and coaches as District of Columbia employees for all three policy years. Hartford billed Pro-Football for the additional premiums which, after adjustments between the parties, amount to $5,350,762 for the three policy years. Hartford also issued an endorsement to the 1990-91 policy which reclassified the players and coaches as District of Columbia employees and applied District of Columbia rates. Pro-Football objected to paying the higher premiums, and Hartford brought this case.

II. ANALYSIS

A. Motions for Summary Judgment

Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial -- whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255. At the same time, however, Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, 'designate specific

facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Hartford seeks summary judgment in its favor, contending that the insurance policy permitted it to reclassify Pro-Football's players and coaches as District of Columbia employees and charge D.C. premiums, and that Pro-Football's refusal to pay the additional premiums constitutes breach of contract. Conversely, Pro-Football contends that the policy does not permit Hartford to change the jurisdictional basis of the premiums, and that Pro-Football should be granted judgment in its favor on Hartford's claims.

The insurance policy, which is identical in all material respects for all the years in question, contains several pertinent provisions. First, the Information Pages attached to the policy repeatedly refer to premiums as "estimated." Item 4 of the Information Pages states that "the premium for this policy will be determined by our manuals of rules, classifications, rates and rating plans. All information required below is subject to verification and change by audit." Additionally, the policies for 1989-90 and 1990-91 state that:

> the premium for the policy will be adjusted by an experience rating modification factor. The factor was not available when the policy was issued. The factor, if any, shown on the information page is an estimate. We will issue an endorsement to show the proper factor, if different from the factor shown, when it is calculated.

The main body of the policy also contains several pertinent provisions. In the "General Section," the policy states that:

> This policy includes at its effective date the Information Page and all endorsements and schedules listed there. . . . The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

Part Five of the policy, which pertains to premiums, contains the following relevant provisions:

> A. Manuals
>
> All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.
>
> B. Classifications
>
> Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

* * *

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy.

* * *

G. Audit

We may conduct . . . audits during . . . the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium.

In interpreting a contract, the Court is to determine what a reasonable person in the position of the parties would believe the language meant. 1010 Potomac Ass'n v. Grocery Mfctr's of America, Inc., 485 A.2d 199, 205 (D.C. 1984). "The writing must be interpreted as a whole, giving a reasonable, lawful, and effective meaning to all its terms." Id. Moreover, "[i]f the document is facially unambiguous, its language should be relied upon as providing the best objective manifestation of the parties' intent." Id. Whether a contract is ambiguous is a question of law for determination by the court. Young v. Delaney, 647 A.2d 784, 791 (D.C. 1994). And, "[o]f course, a contract is not rendered ambiguous merely because the parties thereto do not agree upon its proper construction." Id.

Upon consideration of the language of the insurance policy, together with the parties' stipulations of fact concerning the background and development of the policy, it is evident to the Court that the express language of the policy does not permit Hartford to retroactively change the jurisdictional basis of the policy for Redskins players and coaches. Hartford contends that because the Anderson decision made clear that Redskins players may claim workers compensation benefits in D.C., the Anderson decision means that D.C. rates "lawfully apply" to the policy, such that use of D.C. rates in calculating the final premium is both authorized and required by the "Final Premium" clause of the policy, quoted above. Hartford's position would require interpreting the policy to authorize that which its plain language does not.

The policy unequivocally states that the terms of the policy can only be changed through endorsement to the policy. Policy at 1. The terms of the policy included a classification of Redskins players and coaches as Virginia employees. Hartford unquestionably only issued an endorsement to reflect the jurisdictional change for the 1990-91 policy.[6] Thus, Hartford did not satisfy the requirements of the policy, namely an endorsement, for the 1988 and 1989 policy years. Because no endorsement was issued, and no other provision of the policy authorizes Hartford to make the change in question, Hartford cannot effect a change in the policy's terms and charge additional premiums for the 1988 and 1989 policy years.

[6] Hartford's argument that a letter from its counsel to Pro-Football's insurance agent constituted an effective endorsement is unpersuasive. Hartford Opp. Exh. A. Nowhere does the letter purport to be an endorsement, nor is it labelled as such. Moreover, the letter states that "endorsements are being prepared" for the 1990 policy, but is silent on endorsements for the 1988 and 1989 policies. Thus, the text of the letter wholly undercuts Hartford's contentions.

More importantly, however, the policy does not authorize Hartford to change the jurisdictional basis of the policy, through an endorsement or otherwise. The policy permits changes affecting premiums in a number of specified ways. First, the Information Pages to the policy make clear that the experience modifier may be changed through endorsement to the policy. Second, changes to the "business or work" classifications may be made through endorsement to the policy if the classifications in the policy do not properly describe an employer's "actual exposures." For example, if employees classified as office personnel in fact performed construction work, Hartford could reclassify those employees and assess the corresponding rates and premium basis by endorsement to the policy. It is evident, however, that the Classifications clause goes to the work classifications of the insured's employees, and not the jurisdictional basis of the rates assigned to those classifications.[7] Had the parties intended the clause to include geographic classifications as well as "business or work" classifications, presumably they would have included such language in an endorsement to the policy.

Similarly, the policy permits Hartford to conduct audits to determine the accuracy of the information provided by Pro-Football, prior to calculating the final premium. According to the express terms of the policy, final premium is then calculated using the actual, not the estimated, premium basis (i.e., payroll) and the proper

---

[7] The endorsement issued for the 1990-91 policy provides further support for this position. The purpose of the endorsement was to change the rates from Virginia to D.C. To accomplish this objective, the endorsement does not change the classifications in the policy, but rather "is amended to change payroll" on the previously-designated classifications. Hartford Opp. Exh. A.

classifications and rates determined under the Classifications clause. Policy, Part Five, ¶ E. In other words, the Final Premium clause means that final premium equals final classifications and rates, as determined under the Classification clause (which require an endorsement to change) multiplied by the actual premium basis, as determined under the Audit clause.

Hartford would stretch the interpretation of this Final Premium clause to authorize applying a different jurisdiction's rates to the policy, if those rates "lawfully apply." However, such an interpretation conflicts with the express policy provisions setting forth the basis for calculating final premiums, as described above, as well as the general provision requiring changes in the terms of the policy to be made through an endorsement.

Moreover, the Court agrees with Pro-Football that nothing in the Anderson decision mandated Hartford to retroactively switch the jurisdictional basis of its policies. Anderson held that Redskins players who play at RFK Memorial Stadium may collect D.C. workers compensation benefits if they are injured in the course of employment. Certainly the Anderson decision constitutes an important factor that Hartford and other insurers, as well as a state's WCIP, should take into consideration in determining the appropriate jurisdiction and premiums for a workers compensation insurance policy.[8] But the decision cannot be read as mandating a retroactive change in the jurisdiction of the premiums, particularly in light of the

---

[8] In this regard, it is interesting that Hartford continued to agree to classify Redskins players and coaches as Virginia employees even after the D.C. Department of Employment Services rendered its decision holding that Redskins players were eligible for D.C. workers compensation benefits.

absence of an express provision in the contract addressing such a potential change.[9]

Finally, Hartford argues that the insurance policy must be interpreted in light of policy considerations, namely to discourage employers like Pro-Football from paying artificially low workers compensation premiums by claiming its employees are based in a cheaper state, and thereby obtaining a windfall to the detriment of other employers in the WCIP. As a policy matter, Hartford may well be correct. However, the express language of the insurance policy at issue in this case does not permit Hartford to take the action it contends would fulfill these policy objectives.[10]

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[9] Nor has Hartford offered evidence that either the Virginia or D.C. WCIP, or NCCI, directed Hartford to change the jurisdictional basis of the policy in light of Anderson. If they had, arguably this would constitute a change "authorized by law or a governmental agency regulating this insurance," Policy, Part Five, ¶ A, such that Hartford would be justified in charging different rates.

[10] In support of its policy arguments, Hartford submitted the affidavit of Robert Willis, the former Commissioner of Insurance for the District of Columbia. Pro-Football objected to the Willis affidavit, but countered with the affidavit of Ronald Herzfeld, a former NCCI employee. Hartford moved to strike the Herzfeld affidavit, contending that Pro-Football had failed to disclose Herzfeld and make him available for an expert deposition, as required by the Federal Rules of Civil Procedure.

Because both sides utilized expert affidavits in the pending motions without disclosing such experts and offering such experts for deposition during the time for discovery in this case, both affidavits are stricken, and neither was considered in connection with this Memorandum Opinion and Order. The Court specifically noted in her September 26, 1995 Order that all discovery closed on October 17, 1995. The parties were obligated to seek leave of Court prior to obtaining additional discovery, including expert testimony, after that time. They did not.

For the foregoing reasons, the Court concludes that the insurance policies in question do not permit Hartford unilaterally and retroactively to switch the jurisdictional basis of the policies. If Hartford was concerned about the impact of players obtaining D.C. workers compensation benefits, its recourse was through an experience modifier, if authorized and appropriate, or through modifying the jurisdictional basis of the policy when the policies were renewed.[11] But having agreed at the outset that classification of the players as Virginia employees was appropriate, Hartford cannot revisit that issue in the manner at issue here. Judgment in Pro-Football's favor on the complaint is therefore appropriate.

B. Motion To Dismiss

In viewing a motion to dismiss, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Kenneda v. United States, 880 F.2d 1439, 1422 (D.C. Cir. 1989). The factual allegations of the complaint must be presumed true and liberally construed in favor of plaintiff. Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 33 (D.C. Cir. 1987); Shear v. National Rifle Ass'n of Am., 606 F.2d 1251, 1253 (D.C. Cir. 1979); see also 5A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 1357, at 304 (1990). The plaintiff is entitled to all favorable inferences which may be drawn from those allegations. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

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[11] Of course, both parties could have mutually agreed to change the jurisdictional basis and modified their contract accordingly.

Following the Court's denial of Pro-Football's initial motion to dismiss, Pro-Football filed its answer and an eight-count counterclaim. The counterclaim brings claims for fraud, negligent misrepresentation, breach of fiduciary duty, bad faith, and breach of contract, as well as a request for declaratory judgment regarding, inter alia, the proper classification of Redskins employees.

1. Breach of Contract and Tort Claims

The breach of contract and tort claims stem from Pro-Football's allegations that Hartford had a conflict of interest while representing Pro-Football in the Anderson litigation. According to Pro-Football, Hartford knew that if Anderson was decided against Pro-Football, i.e., that players were found to be eligible for D.C. workers compensation benefits, Hartford would retroactively seek D.C. premiums from Pro-Football for 1988-91. This would translate into much higher fees for Hartford, because the fee percentage for the WCIP in the District of Columbia is substantially higher than Virginia, as are the premiums to which the percentage is applied. Thus, according to Pro-Football, Hartford stood to gain financially from an adverse decision in Anderson, and Hartford failed to disclose this alleged conflict of interest to Pro-Football.

Hartford makes a number of arguments in support of its motion to dismiss the counterclaims, but the Court need consider only one of Hartford's arguments because it is dispositive. Hartford argues that Pro-Football's counterclaims are barred by the District of Columbia's three-year statute of limitations on tort and contract claims. The Court agrees.

Pro-Football's tort and contract claims accrued no later than the spring of 1991, after Anderson was decided

against Pro-Football and Hartford notified Pro-Football that it was reclassifying the Redskins' players and coaches as District of Columbia employees for all three policy years and demanding millions of dollars in additional premiums. By this time, both the alleged breach of the insurance contract as well as the injury to Pro-Football had occurred, and the statute of limitations began to run.

Hartford and Pro-Football entered into a tolling agreement to toll the statute of limitations on "an[y] action in connection with the unpaid premiums." The agreement extended the statute of limitations until October 22, 1994 for such actions. Hartford filed its complaint on October 20, 1994. Pro-Football filed its counterclaims on October 10, 1995, well past the October 22, 1994 deadline contained in the tolling agreement and well outside the applicable statute of limitations had there not been a tolling agreement.

Pro-Football argues that its claims are timely because Hartford's complaint tolls the statute of limitations on compulsory counterclaims. While tolling may be the majority approach, see Federal Practice and Procedure: Civil 2d § 1419, the issue is determined by reference to state law in diversity actions. Id.; see also Kuwait Airways Corp. v. American Security Bank, N.A., 890 F.2d 456, 460 (D.C. Cir. 1989) (court sitting in diversity looks to local law for applicable statute of limitations). In the District of Columbia, "affirmative claims made by way of setoffs and counterclaims must be tested by the statute of limitations" in determining whether the claim is time barred. Sears, Roebuck and Co. v. Goudie, 290 A.2d 826, 830 (D.C.), cert. denied, 409 U.S. 1049 (1972).[12]

[12] De Vito v. Hoffman, 199 F.2d 468 (D.C. Cir. 1952), cited by Pro-Football for the opposite conclusion, predates Goudie by 20 years and is not controlling here.

Pro-Football argues that Goudie does not control this case, contending that the case does not expressly address the question of whether a complaint tolls the statute of limitations for compulsory counterclaims. However, the Goudie court's determination that the complaint does not toll counterclaims (except for recoupment claims) is implicit, in that the counterclaim at issue in Goudie would plainly have been timely had the statute of limitations been tolled by the complaint.

Thus, testing the counterclaim against the three-year statute of limitations, as Goudie directs, it is evident that Pro-Football's counterclaims are time barred. The counterclaims were filed on October 10, 1995; the statute of limitations, pursuant to the tolling agreement, expired on October 22, 1994. Accordingly, the statute of limitations bars Pro-Football's claims.

Pro-Football argues that this result is inconsistent with the Federal Rules of Civil Procedure, under which an answer and counterclaim need not be filed until 10 days after a court rules on a motion to dismiss brought under Rule 12. No doubt Pro-Football's actions in this case comported with the procedural requirements set forth in the Federal Rules. However, the Federal Rules are procedural in nature -- they do not supersede or alter the substantive statute of limitations applicable to a claim. Nor do the Federal Rules "offer any solution to the problem of whether the institution of an action tolls the running of the limitations period on compulsory counterclaims or reflect any federal policy on the question." Federal Practice and Procedure: Civil 2d § 1419. Consequently, the Federal Rules do not save Pro-Football's claims.

2. Declaratory Judgment Claim

Count VIII of the counterclaim seeks a declaratory judgment that (1) for purposes of the workers compensation insurance policy, Redskins players should be classified as Virginia employees; (2) that Anderson does not require or permit Hartford to reclassify Redskins players retroactively for purposes of determining premiums; and (3) that D.C. Code § 36-303(a-3), which exempts temporary or intermittent employees from D.C.'s workers compensation law, exempts Redskins players from eligibility for D.C. workers compensation benefits. This declaratory relief is neither appropriate nor warranted.

At the outset, the Court does not find declaratory relief is appropriate with regard to the interpretation of D.C.'s workers compensation statute. Such relief would be in the form of an advisory opinion, given the lack of a concrete workers compensation claim upon which the decision would be based. See Adv. Comm. notes to Fed. R. Civ. P. 57; see also Federal Practice and Procedure: Civil 2d § 2757. Parties highly interested in the declaration sought, namely the Redskins players, are not part of this action. Id. Moreover, under the workers compensation statute, it is the province of the Mayor, through the Department of Employment Services, and the District of Columbia Court of Appeals to determine the eligibility of workers to D.C. workers compensation benefits. D.C. Code §§ 36-320 & 322. Whether or not Redskins players fall within the statutory exception for temporary or intermittent employees is a question that these officials have the authority to decide, and will not be decided by this Court in a case involving interpretation of a workers compensation insurance policy.

Nor is the proper classification of Redskins players an appropriate subject for declaratory relief. This case asked the Court to determine whether a contract entered into by the parties permitted retroactive reclassification by one party. The Court has determined, supra, that under the contract, Hartford could not retroactively reclassify these players as D.C. employees for the policy years 1988-91. Whether it is appropriate for Hartford, or some other insurer, to classify the players as D.C. or Virginia employees as a general matter is an entirely separate issue from the contract question and the record before this Court. Declaratory relief on this issue is not appropriate.[13] Similarly, the Court has ruled that Anderson did not require or authorize Hartford to retroactively reclassify Redskins players as D.C. employees under the terms of the policy presented to the Court. This is not the forum or the case for further elaboration on Anderson's effect on other workers compensation matters.

For the foregoing reasons, Pro-Football's request for declaratory relief is denied.

III. CONCLUSION

For the reasons set forth above, it is

ORDERED that Hartford's Motion for Partial Summary Judgment as to Liability is denied; it is

FURTHER ORDERED that Pro-Football's Motion for Summary Judgment is granted as to the complaint; and it is

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[13] Here too, parties interested in the issue, namely the District of Columbia and Virginia workers compensation administrators, are not part of this action. For this additional reason, declaratory relief is inappropriate.

FURTHER ORDERED that Hartford's Motion to Dismiss Pro-Football's counterclaims is granted.

IT IS SO ORDERED.

August 21, 1996

Joyce Hens Green /s/

JOYCE HENS GREEN
United States District Judge

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

FILED DEC 10 1997

CLERK

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7215 **September Term**, 1997 - 94cv02266

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellant

V.

PRO-FOOTBALL, INC., D/B/A
WASHINGTON REDSKINS,

Appellee

Consolidated with No. 96-7222

Before: Wald, Williams and Ginsburg, *Circuit Judges.*

ORDER

Upon consideration of the petition for rehearing of appellee/cross-appellant filed November 26, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner /s/
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

FILED DEC 10 1997

CLERK

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7215 **September Term**, 1997 - 94cv02266

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant

V.

PRO-FOOTBALL, INC., D/B/A
WASHINGTON REDSKINS,
Appellee

Consolidated with No. 96-7222

Before: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Upon consideration of appellee/cross-appellant's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner /s/
Robert A. Bonner
Deputy Clerk

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 12(a)(1)(A):

> Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer (A) within 20 days after being served with the summons and complaint . . . .

Federal Rule of Civil Procedure 12(a)(4)(A):

> Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows: (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action . . . .

Federal Rule of Civil Procedure 13(a):

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's

> claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

Federal Rule of Civil Procedure 56(a):

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Federal Rule of Civil Procedure 56(c):

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary

judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Supreme Court, U.S.
FILED
MAR 20 1998
CLERK

No. 97-1480

In The

Supreme Court of the United States

October Term, 1997

PRO-FOOTBALL, INC., d/b/a
THE WASHINGTON REDSKINS,

Petitioner,

v.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does Rule 56 of the Federal Rules of Civil Procedure limit the authority of a United States court of appeals to construe an insurance policy in accordance with local law.

2. Should this Court require the District of Columbia to follow the "majority rule" concerning how time is counted in determining whether a local statute of limitations bars a counterclaim.

RULE 29.6 STATEMENT

The respondent, Hartford Accident and Indemnity Company, is a wholly-owned subsidiary of the Hartford Financial Services Group Incorporated.

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Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* (3d ed. 1996) 4

STATUTES INVOLVED

The decision of the court below does not rest upon any federal statute or rule. It reflects an application by the court of appeals of the local jurisprudence of the District of Columbia.

STATEMENT OF THE CASE

This is an action for breach of contract brought by the Hartford Accident and Indemnity Company ("Hartford") against Pro-Football, Inc. ("PFI") to recover money damages under an insurance agreement between Hartford and PFI. From July 1988 to July 1991, Hartford administered a standard residual (high risk) market workers' compensation insurance policy obtained by PFI to cover the players and other employees of the Washington Redskins professional football team.

This standard policy is mandated by law in the District of Columbia ("D.C.") and the Commonwealth of Virginia and neither Hartford nor PFI had any authority to alter its terms. Among those terms is a provision requiring Hartford to recalculate the "final premium" for this coverage at the end of the term of the policy so that all the pricing factors affecting the premium are correct for the coverage provided. *See* App. 5. Pricing factors include the rate set by law in the jurisdiction for the classes of employees who work for the employer (*e.g.*, contact sports or truck drivers) applied to the payroll for each class times a factor set by law to capture the employer's actual loss experience or injury rate.

When the policy first was issued in 1988, Hartford expressed an intent to treat the Redskins players as D.C. employees and charge D.C. rates. PFI protested being charged D.C. rates. It claimed that the players were Virginia employees and their coverage should be priced at Virginia rates. It makes a difference because the rate prescribed by the D.C. Department of Insurance as a result of D.C.'s more generous workers' compensation law and other factors makes the coverage of some similarly situated workers, including football players, much more expensive in D.C. than in Virginia. In 1988, PFI was litigating the question of whether the players were D.C. or Virginia employees and it was not yet decided. Hartford agreed to cover the players as Virginia employees, although most injured players continued to file workers' compensation claims as if they were D.C. employees.

The D.C. Court of Appeals settled the question by holding that the players were D.C. employees for workers' compensation purposes, thereby making most players eligible for D.C. benefits, regardless of where they were injured. *Pro-Football, Inc. v. D.C. Dep't of Employment Services*, 588 A.2d 275 (D.C. 1991) ("*Anderson*"). App. 3. Shortly after *Anderson*, Hartford notified PFI that its players would no longer be classified as Virginia employees. *Anderson* was retroactive, covering all injuries occurring during the Hartford policy period. Accordingly, after the termination of the 1991 policy year, Hartford recalculated the premium for all three years of the policy to properly collect the amount that should have been charged for three years of D.C. coverage. PFI had paid only for three years of Virginia coverage.

Hartford billed PFI for the underpayment of premium and PFI refused to pay. Hartford sued for breach of contract and PFI counterclaimed. Cross-motions for summary judgment were filed. The district court granted summary judgment to PFI on Hartford's breach of contract claim. Summary judgment was granted to Hartford on PFI's counterclaims on the grounds that they were untimely under D.C. law.

Both sides appealed and on October 28, 1997, the court of appeals reversed the grant of summary judgment on Hartford's breach of contract claim and affirmed the dismissal of the untimely counterclaim. App. 1. The court of appeals also directed the district court to enter summary judgment in favor of Hartford on its breach of contract claim. App. 16. The case was remanded for a determination of damages.

This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

This case involves no unsettled or important principle of federal law and presents no jurisprudential disagreement. It was decided under settled principles of the local law of the District of Columbia and it does not meet the requirements for review on certiorari set forth in Rule 10 of the Rules of the Supreme Court of the United States.

PFI's main complaint is that Rule 56 of the Federal Rules of Civil Procedure precludes the court of appeals' interpretation of the insurance policy. This was not pressed in the court of appeals, but even if it were, it

lacks merit. Under D.C. law, the interpretation of an insurance policy is a matter of law that is decided by the court. *Geico v. Fetisoff*, 958 F.2d 1137, 1141 (D.C. Cir. 1992). The court of appeals applied D.C. law and interpreted the policy to permit a recalculation of the premiums to properly capture the rate applicable to D.C. football players. Nothing in this holding implicates Rule 56 or suggests an important question of its applicability in this or any setting.

Moreover, the interpretation favored by the court of appeals is fully consistent with every other judicial decision interpreting similar or identical "final premium" clauses in insurance policies. *See e.g., D.A.X., Inc. v. Employers Ins. Of Wausau*, 659 N.E.2d 1150 (Ind. Ct. App. 1996); *Continental Ins. Co. v. Seppala & Aho Constr. Co., Inc.*, 430 A.2d 157 (N.H. 1981); *see also* Lee R. Russ & Thomas F. Segalla, 5 *Couch on Insurance* § 99.15 (3d ed. 1996). No genuine issue of federal law is presented, and there is no reason for this Court to review the court of appeals' interpretation of this insurance contract.

On the counterclaim, PFI simply asks this Court to conform D.C. law to a majority rule on the relation back of counterclaims. There is no issue of federal law presented here and this Court does not conform the substantive laws of the individual states or D.C. to some preferred majority or minority position, absent a compelling constitutional concern. There is no such concern here.

CONCLUSION

The petition for writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 97-1480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PRO-FOOTBALL, INC. d/b/a
THE WASHINGTON REDSKINS,

Petitioner,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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5 pp

In its Petition for Writ of Certiorari, Pro-Football, Inc. ("PFI") demonstrated that it shifted the risk of loss for workers' compensation claims to Respondent Hartford by purchasing workers' compensation insurance policies (collectively, the "Policy") from Hartford. In the Policy, Hartford agreed to charge Virginia premiums in return for this shifting of risk. This expressly agreed upon term of the Policy reflected the fact that PFI's players spend the vast majority of their working hours in Virginia and work in the District of Columbia only 8-12 times a year.[1] In fact, Hartford continued to charge Virginia premium rates even after the District of Columbia Department of Employment Services found certain of PFI's players eligible for District of Columbia workers' compensation benefits in the *Anderson* case. Moreover, as Hartford has admitted, the District of Columbia Court of Appeals, in affirming *Anderson*, said nothing about whether Hartford could charge District of Columbia premium rates.[2]

[1]Without any support from the record, Hartford claims it "expressed an intent to treat the Redskins' players as D.C. employees and charge D.C. rates" and "agreed to cover the players as Virginia employees" only after "PFI protested being charged D.C. rates." Brief in Opposition ("Opp.") at 2. The record, however, shows that PFI's insurance broker "advised [PFI] that it was appropriate to classify players as Virginia employees" and that Hartford "did not believe that such a classification was improper." Joint Stipulations of Fact ("J.S.") ¶ 36. The record further shows that "[t]he premium actually paid by [PFI] was calculated using rates and rating rules established and approved by Virginia" for players. *Id.* ¶ 53.

[2]Thus, Hartford is simply wrong when it asserts that *Anderson* "settled the question" of whether PFI's players were District of Columbia employees "for workers' compensation purposes." Opp. at 2. The only question *Anderson* settled was whether players were District of Columbia employees for the purpose of eligibility for workers' compensation *benefits*. The decision said nothing whatsoever about whether they were District of Columbia employees for purposes of calculating insurance *premiums*.

Nonetheless, the District of Columbia Circuit in the present case relied on *Anderson* in ordering summary judgment for Hartford on the question of whether the Policy permitted Hartford to charge District of Columbia premium rates retroactively. In so holding, the court below wrongfully relieved Hartford of its burden under Fed. R. Civ. P. 56 of demonstrating that its reading of the Policy was the only reasonable one. The court's opinion thus conflicts with decisions of this Court and other Circuits holding that the party moving for summary judgment bears the burden of demonstrating the absence of genuine issues of material fact and entitlement to judgment as a matter of law. The District of Columbia Circuit's opinion also conflicts with opinions of other Circuits holding that summary judgment is inappropriate in contract cases unless there is only one plausible reading of the contract.

Hartford is, therefore, wrong when it claims that "[t]he decision of the court below does not rest upon any federal statute or rule," but rather "reflects" only "an application by the court of appeals of the local jurisprudence of the District of Columbia." Opp. at 1. Rule 56 controls whenever a party seeks to uphold summary judgment. Moreover, when a court of appeals lessens the moving party's burden under this rule -- contrary to the decisions of this Court and other Circuits -- certiorari should be granted and the decision below reversed.[3]

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[3]Hartford suggests (Opp. at 3) that PFI did not press its point regarding the allocation of the burden of proof on summary judgment in the court below. What Hartford ignores is that the District Court properly allocated the burden and, consequently, neither party had to argue the burden issue on appeal. It was only when the appellate court erroneously relieved Hartford of this burden that it became appropriate for PFI to raise this issue.

The decision below rests not only on Fed. R. Civ. P. 56 but on another federal rule as well. Fed. R. Civ. P. 12(a)(4) expressly allows a defendant 10 days to answer and counterclaim following the denial of a motion to dismiss. Here, Hartford filed its complaint two days before the expiration of the statute of limitations. PFI moved to dismiss and, when its motion was denied, answered and counterclaimed within the 10-day limit. The Court of Appeals nevertheless affirmed the dismissal of PFI's compulsory counterclaims as untimely, reasoning that the filing of Hartford's complaint did not toll the statute of limitations.

In so holding, the court below effectively abrogated the time limit set forth in Fed. R. Civ. P. 12(a)(4) and denied PFI its day in court on the merits of its counterclaims. Under the lower court's ruling, a party does not, in fact, have the time periods set forth in the Federal Rules in which to answer and counterclaim. Rather, in the lower court's opinion, PFI had only two days to find and retain an attorney who could not move to dismiss, but rather had to answer and counterclaim immediately or lose the right to file even compulsory counterclaims. This result contravenes the policies underlying the Federal Rules of Civil Procedure.

In response, Hartford claims that PFI "asks this Court to conform D.C. law to a majority rule on the relation back of counterclaims." Opp. at 4. This claim mischaracterizes PFI's argument. PFI does not ask this Court to force the District of Columbia to adopt the "majority rule," under which the filing of a complaint tolls the statute of limitations for compulsory counterclaims. Rather, PFI submits that the District of Columbia already follows the majority rule, *see DeVito v. Hoffman*, 199 F.2d

468 (D.C. Cir. 1952), and that the court below erred in holding otherwise. What makes this holding worthy of certiorari is that, by misreading District of Columbia law, the lower court essentially disregarded Rule 12(a)(4). If, as Hartford claims, the District of Columbia follows the minority rule, then a litigant such as Hartford can wait until just before the statute of limitations runs to file a lawsuit and then obtain dismissal of compulsory counterclaims even if they were filed within the time limits specified in Rule 12(a)(4). As PFI has shown, such a result is bad law and bad policy because it effectively reads those time limits out of the Rule and, contrary to sound public policy, actually encourages litigation. Accordingly, this Court should grant certiorari to review the dismissal of PFI's counterclaims as well.

CONCLUSION

For all the reasons set forth above and in the Petition, PFI respectfully asks this Court to issue a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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